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No. ____

IN THE

Supreme Court of the United States

CHARLES GILBERT GIBBS, ET AL.,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause authorizes federal restrictions on the ability of individuals to defend themselves and their property from wild wolves, when such actions are wholly intrastate and noncommercial.

INTERESTED PARTIES

Petitioners, plaintiffs below, are Charles Gilbert Gibbs; Richard Lee Mann, III; Hyde County, North Carolina; and Washington County, North Carolina.

The federal respondents, defendants below, are Bruce Babbitt, Secretary of the Interior; United States Fish and Wildlife Service; United States Department of the Interior; and Jamie Clark, Director of the United States Fish and Wildlife Service.

The private respondent is Defenders of Wildlife, which intervened as a defendant in the lower courts.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Charles Gilbert Gibbs, *et al.* respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 214 F.3d 483. The order of the district court (App., *infra*, 58a-69a) is reported at 31 F. Supp. 2d 531.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2000. A petition for rehearing was denied on August 25, 2000. App., *infra*, 56a-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

The federal regulation at issue, 50 C.F.R. § 17.84(c), is reproduced in the Appendix, *infra*, 70a-74a.

STATEMENT OF THE CASE

Petitioners challenged the constitutionality, under the Commerce Clause, of a federal regulation that generally prohibits individuals from protecting themselves and their property from the depredations of wild wolves, even where such actions are wholly intrastate and noncommercial in nature. The district court granted summary judgment for respondents. The court of appeals, over Judge Luttig's dissent, affirmed.

1. This case involves a regulation promulgated under the Endangered Species Act of 1973 ("ESA"), Pub. L. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1994 & Supp. III 1997)). The regulation at issue generally prohibits human interference with red wolves, a species of wild animal recently reintroduced to North Carolina by the federal government. *See* 50 C.F.R. § 17.84(c).

The ESA authorizes the Secretary of the Interior to designate animal species as "endangered" or "threatened." 16 U.S.C. § 1533. Among other prohibitions, the ESA makes it unlawful for any person to "take" an endangered or threatened species without a permit. 16 U.S.C. § 1538(a)(1)(B). The term "take" is defined as

"to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

The ESA also authorizes the Secretary to release an "'experimental population' . . . of an endangered species or a threatened species" into areas currently unoccupied by that species. 16 U.S.C. § 1539(j)(1)-(2)(A). A reintroduced experimental population is "treated as a threatened species." 16 U.S.C. § 1539(j)(2)(C). That designation allows the Secretary to specify, by rule, the prohibitions of and exceptions to the ESA that apply to the experimental population. *See* 16 U.S.C. § 1533(d).

Pursuant to these provisions of the ESA, and acting under delegated authority from the Secretary of the Interior, the U.S. Fish and Wildlife Service ("FWS") developed a special program to reintroduce the red wolf (*Canis rufus*)—which had been designated an endangered species in 1967, *see* 32 Fed. Reg. 4001 (Feb. 24, 1967)—as an experimental population. An effort was initiated in 1980 to release red wolves in Kentucky and Tennessee, but that plan was eventually withdrawn in 1984 due to public opposition. *See* App., *infra*, 59a-60a n.1. A subsequent effort to release red wolves into the Alligator River National Wildlife Refuge, located in eastern North Carolina, was proposed in 1986 and launched in the fall of 1987. *See id.* at 59a-60a. FWS described the geographic scope of the reintroduction as follows: "The Alligator River National Wildlife Refuge reintroduction site is within the historic range of the species in North Carolina, in Dare and Tyrrell Counties; because of their proximity, Beaufort, Hyde, and Washington Counties are also included in the experimental population designation." 50 C.F.R. § 17.84(c)(9)(i).

In conjunction with the federal government's effort to reintroduce red wolves to North Carolina, FWS promulgated a regulation concerning the experimental population. *See* 50 C.F.R. § 17.84(c). That regulation prohibits, with limited exceptions, the "taking" of red wolves by private persons. *See* 50 C.F.R. § 17.84(c)(2). The ESA authorizes both civil and criminal penalties for violations of its provisions or regulations promulgated thereunder. *See* 16 U.S.C. § 1540(a)-(b).

2. Although the initial site of reintroduction was on federal land, red wolves have wandered onto private property with disturbing ease and frequency. "From available data, as of February 1998 it was estimated that about 41 of the approximately 75 wolves in the wild may now reside on private land." App., *infra*, 5a. The federal government's proven inability to protect private landowners from incursions by red wolves creates an inevitable and dangerous conflict between wolves and humans. *See* App., *infra*, 19a ("Since reintroduction, red wolves have strayed from federal lands onto private lands. Indeed, wolves are known to be 'great wanderers.'") (citation omitted).

– Petitioner Richard Lee Mann, III, is a resident of Hyde County, North Carolina, whose small son was threatened by a red wolf. *See* C.A. App. 8. He was subsequently prosecuted under 50 C.F.R. § 17.84(c) for killing a red wolf that he believed was a threat to his cattle. *See* C.A. App. 8. Following a guilty plea, he was fined $2,000 and sentenced to perform community service building "wolfhouses" and feeding red wolves. *See* App., *infra*, 62a. Petitioner Charles Gilbert Gibbs is also a Hyde County resident. He has lost several calves, ap-

parently to red wolf attacks, for which FWS has refused to reimburse him. *See ibid.*

Petitioners Hyde County and Washington County are, as FWS has recognized, proximate to the Alligator River National Wildlife Refuge reintroduction area and therefore are subject to incursion by red wolves. *See* 50 C.F.R. § 17.84(c)(9)(i). In response, the County Commission of Washington County approved a resolution in 1992 opposing the red wolf program. *See* App., *infra*, 62a. The County Commission of Hyde County approved a resolution in 1994 requesting removal of red wolves from private lands within the county. *See ibid.* In addition to these resolutions by the county petitioners, the North Carolina General Assembly passed a law entitled "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." *Id.* at 7a, 62a-63a (citing 1994 N.C. Sess. Laws Ch. 635). The North Carolina Department of Agriculture has also objected to the red wolf program. *See* App., *infra*, 62a.

3. Petitioners sued the federal agencies and officials responsible for the red wolf reintroduction program, challenging the constitutionality of the red wolf regulation. In particular, petitioners alleged that the prohibition against the "taking" of red wolves on private property exceeded the federal government's authority under the Commerce Clause. *See* App., *infra*, 8a.

a. The district court granted summary judgment for respondents. The court recognized that the sole "nexus between the regulation at issue and interstate commerce is the red wolf." App., *infra*, 66a. The court concluded that red wolves "substantially affect interstate commerce through their tourism value." *Ibid.* That is because, according to the court, "tourists do cross state lines to see

the red wolf." *Id.* at 67a. While the court acknowledged that it was "difficult . . . to fully assess the red wolf's impact on tourism," the court noted that "many persons have traveled from other states to attend red wolf 'howling' events conducted at the Alligator River National Wildlife Refuge in North Carolina." *Id.* at 67a n.9. "Unrestricted taking of red wolves on private land," the court said, "would present a clear threat to this commerce." *Id.* at 67a.

b. The court of appeals, by divided vote, affirmed. The panel members all agreed that the constitutionality of the red wolf regulation had to be evaluated under the standards articulated by this Court in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995). They differed, however, as to the application of those standards in this case.

The majority recognized that, "[t]o fall within Congress's commerce power, this regulation . . . must 'substantially affect interstate commerce.'" App., *infra*, 14a (quoting *Lopez*, 514 U.S. at 559). The majority held that this standard was satisfied because "[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." App., *infra*, 15a-16a. The majority also recognized that the prohibition against taking red wolves must constitute "economic activity." *Id.* at 15a (citing *Morrison*, 120 S. Ct. at 1750). The majority said, without citing any authority or record evidence, that this requirement was met because "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." App., *infra*, 15a. The majority

thus concluded that, "[w]hile the taking of one red wolf on private land may not be 'substantial,' the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold this regulation." *Id.* at 16a.

Judge Luttig dissented. He maintained that the majority's decision could not be reconciled with this Court's decisions in *Lopez* and *Morrison*. *See* App., *infra*, 47a. As Judge Luttig explained, "[t]he killing of even all 41 of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court in *Lopez* and in *Morrison* to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all." *Id.* at 50a. Moreover, according to Judge Luttig, "even assuming that such is an economic activity, it certainly is not an activity that has a substantial effect on interstate commerce." *Ibid.* Judge Luttig concluded that the majority's analysis was akin to (if not more expansive than) that of the dissenters in *Lopez* and *Morrison* rather than the majorities, and would, if accepted, "consign[] to aberration" this Court's decisions in those cases. *Id.* at 51a.

REASONS FOR GRANTING THE PETITION

This case presents a constitutional question substantially identical to one of the issues currently before the Court in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178 ("*SWANCC*"). Accordingly, the petition should be held pending the Court's disposition of that case. If this Court reaches the constitutional question in *SWANCC*, this case should be remanded to the court of appeals regardless of how the issue is resolved in *SWANCC*. In

the event the Court does not reach the constitutional question in *SWANCC*, however, the Commerce Clause question presented by this case warrants plenary review.

I. The Petition Should Be Held Pending The Court's Decision in *SWANCC*

At issue in *SWANCC* is the U.S. Army Corps of Engineers' so-called "migratory bird rule." *See* 51 Fed. Reg. 41,206 (Nov. 13, 1986). This administrative interpretation of the Clean Water Act (33 U.S.C. § 1251 *et seq.*) purports to authorize the exercise of federal jurisdiction over isolated, intrastate waters based solely on the presence of migratory birds. *See* 51 Fed. Reg. at 41,217 (asserting federal jurisdiction over all waters "[w]hich are or would be used as habitat by . . . migratory birds which cross state lines").

The petitioner in *SWANCC* has presented two questions: Whether the migratory bird rule is a permissible construction of the Clean Water Act, and, if so, whether it is within the federal government's authority to regulate interstate commerce. *See* Pet. Br. in *SWANCC* at 11-13. The latter question is substantially identical to the question in this case.

If this Court in *SWANCC* concludes that the Corps' migratory bird rule is authorized by statute, then it will have to analyze the constitutionality of the rule under the Commerce Clause framework set forth in *Lopez* and reiterated last Term in *Morrison*. In *Lopez*, the Court recognized three strands of Commerce Clause authority: "First, Congress may regulate the use of channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,

even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (citations omitted).

As the decisions below in *SWANCC* and in this case make clear, both cases turn on the scope of federal authority under the third strand identified in *Lopez*, which permits Congress to regulate activities that "substantially affect" commerce. *See SWANCC*, 191 F.3d 845, 849 (7th Cir. 1999) ("The gun control law at issue in *Lopez*, like the migratory bird rule challenged here, could only have been sustained as an exercise of the third variety of regulatory power"); App., *infra*, 12a ("if 50 C.F.R. § 17.84(c) [the red wolf regulation] is within the commerce power, it must be sustained under the third prong of *Lopez*").

Moreover, the application of the "substantial effects" test arises in similar contexts in both *SWANCC* and in this case. In *SWANCC*, the asserted connection to interstate commerce is provided by wild birds; here, the commerce nexus is purportedly provided by wild wolves. In both cases, it is the presence of wild animals on private property that is asserted as the sole basis for the exercise of federal jurisdiction over human activities on that property. Arising as they do from parallel premises, the regulations at issue in both *SWANCC* and this case raise substantially the same constitutional question: Does the mere presence of wild animals substantially affect interstate commerce such that Congress can regulate human activities on private property that might impact those animals?

The "substantially affects" strain of Commerce Clause jurisprudence requires the Court to undertake four subsidiary inquiries: (i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the causal link between the regulated activity and interstate commerce is direct or attenuated; (iii) whether the regulation contains an express jurisdictional element; and (iv) whether Congress has made findings regarding the regulated activity's effect on interstate commerce. *See Morrison*, 120 S. Ct. at 1749-51. Each of these inquiries is implicated, in very similar fashion, by both *SWANCC* and this case. Accordingly, this petition should be held pending the Court's resolution of *SWANCC*.

First, the Court has allowed intrastate activities to be considered, *in the aggregate*, as having a substantial effect on interstate commerce only when "the regulated activity was of an apparent commercial character." *Morrison*, 120 S. Ct. at 1750 n.4; *see also Lopez*, 514 U.S. at 561 (Congress may regulate those intrastate activities that "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce"). This is no surprise, since the Commerce Clause, after all, authorizes Congress to regulate only interstate *commerce*, not interstate *activity*.

An important question in both *SWANCC* and this case is whether the regulated human conduct—filling bird-habitat puddles in *SWANCC*, taking wolves in this case—constitutes commercial or noncommercial activity. Neither of the challenged regulations is limited to commercial activity, and the mere existence of wild animals has not heretofore been considered "economic"

in nature. While the Court has suggested that the commerce power extends, unsurprisingly, to *commercial transactions* involving captured animals or their parts (*Andrus* v. *Allard*, 444 U.S. 51, 63 & n.19 (1979)), the Court has never said, much less held, that the Commerce Clause is brought into play due to the simple *presence* of wild animals on private property. The Court's resolution of this issue in the context of birds is likely to be instructive, if not controlling, of the resolution of the same issue in the context of wolves.

Second, the lower courts in both *SWANCC* and this case concluded that human activities that might affect wild animals may constitutionally be regulated because of purported causal links between wild animals and economic activity. In both cases, the courts concluded that human-induced reductions in wildlife might depress interest in interstate tourism or negatively impact the supply of a commercial resource in some manner. *See SWANCC*, 191 F.3d at 850 (upholding migratory bird rule on ground that, "throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds") (quoting *Hoffman Homes, Inc.* v. *EPA*, 999 F.2d 256, 261 (7th Cir. 1993)); App., *infra*, 15a-16a ("with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts"). Yet both *SWANCC* (involving a proposed landfill on private property) and the present case (also involving private land) push the tourism argument to its outermost reaches—to say the least.

Quite similar theories of causation were rejected by the Court in *Lopez* and *Morrison* on the ground that they involved excessively attenuated chains of causation to

link the regulated activity with its effects on interstate commerce. *See Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). Both *SWANCC* and this case test the limits of *Lopez* and *Morrison*, inviting the Court to distinguish the impact of human activity on animals and their habitats (asserted in both *SWANCC* and this case) from the impact of human activity on people and their neighborhoods (held insufficient in *Lopez* and *Morrison*) on interstate tourism or travel. These cases also invite the Court to contrast the commercial interest in human resources, already rejected as insufficient in *Lopez* and *Morrison*, from the commercial interest in wildlife resources asserted by the government in *SWANCC* and this case.

Lopez and *Morrison* identified causal chains that were simply too attenuated and too speculative to constitute a substantial effect on interstate commerce. The causal chains in both *SWANCC* and this case bear striking resemblance to those already held insufficient. *See Cargill, Inc.* v. *United States*, 516 U.S. 955, 957-58 (1995) (Thomas, J., dissenting from denial of certiorari) (stating that "[t]he basis asserted to create federal jurisdiction over petitioner's land [pursuant to the migratory bird rule] seems to me to be even more far-fetched than that offered, and rejected, in *Lopez*"); App., *infra*, 50a (Luttig, J., dissenting) ("The number of inferences (not even to mention the amount of speculation) necessary to discern in this activity a substantial effect on interstate commerce is exponentially greater than the number nec-

essary in *Lopez* . . . or in *Morrison*"); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 Tex. Rev. L. & Pol. 365, 419 (1998) ("If this elaborate chain of contingencies does not stretch the limits of reason, it is hard to imagine a chain that would"). The Court's resolution of the attenuation question with respect to the birds in *SWANCC* will control, or at least directly impact, the resolution of the same question as to the wolves in this case.

Third, neither the migratory bird rule nor the red wolf regulation contains any express jurisdictional element. Thus, both *SWANCC* and this case raise the question whether the determination that wildlife preservation constitutes a valid national concern is, alone, sufficient to permit federal regulation of wholly intrastate, noncommercial activity. *See* U.S. Br. in *SWANCC* at 37 ("[b]ecause migratory birds are a shared resource of the several States, their protection has traditionally been regarded as a task most appropriately performed by the national government"); *compare* App., *infra*, 45a (noting that "the national interest in the development of natural resources" must be considered in determining the scope of federal power under Commerce Clause) *with id.* at 47a-48a (Luttig, J., dissenting) ("the simple (and frankly, considerably less incitant) question of law for us to decide is" not whether there is a national interest in conserving natural resources, but rather "whether . . . this one particular Fish and Wildlife regulation exceeds Congress' power under the Commerce Clause"). The Court's determination whether bird protection of itself is a constitutionally sufficient rationale in *SWANCC* will

directly bear on the sufficiency of the government's interest in wolf reintroduction at issue in this case.

Fourth, both the migratory bird rule and the red wolf regulation are administrative regulations, not statutes as in *Lopez* and *Morrison*. As a result there are no congressional findings regarding the regulated activity's ostensible effect on commerce. *See Lopez*, 514 U.S. at 562 ("as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce"). Moreover, neither the Corps in announcing the migratory bird rule nor FWS in promulgating the red wolf regulation attempted to establish any link between these federal proscriptions and interstate commerce. Therefore, there are no legislative or administrative findings in either *SWANCC* or this case to which this Court might look, much less defer.

In any event, while "[d]ue respect for the decisions of a coordinate branch of Government demands that [this Court] invalidate a *congressional enactment* only upon a plain showing that Congress has exceeded its constitutional bounds" (*Morrison*, 120 S. Ct. at 1748 (emphasis added)), the Court does not give the same deference to constitutional interpretations made by bureaucrats in the Executive Branch. *See, e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 922 (1995). That is particularly true here, where the interstate commerce rationale for the regulation has been articulated only by the government's lawyers in the context of this litigation. *See Martin* v. *OSHRC*, 499 U.S. 144, 156 (1991). The district court in this case, however, concluded that the fact that the asserted federal authority was premised on a

regulation rather than a federal statute was of no consequence to the Commerce Clause analysis. *See* App., *infra*, 64a ("this Court can analyze 50 C.F.R. § 17.84 in the same way it would had that regulation been passed by both Houses of Congress and signed by the President, as opposed to promulgated through the exercise of delegated rulemaking authority"). The Court's consideration in *SWANCC* whether there is any constitutional significance to the distinction between congressional enactments and administrative interpretations will be dispositive of the same problem in this case.

II. This Case Should Be Remanded To The Court Of Appeals Regardless Of How The Court Resolves The Constitutional Question In *SWANCC*

In light of the many similarities between the constitutional questions raised in both *SWANCC* and this case, it cannot seriously be doubted that a constitutional ruling in *SWANCC* will necessarily have a dramatic impact on the validity of the Fourth Circuit's decision—as the government itself has already recognized. The government has cited the court of appeals' decision in this case as support for upholding the migratory bird rule in *SWANCC*. Its brief in *SWANCC* suggests that, if the taking of wolves substantially affects commerce, so does the destruction of migratory bird habitat. *See* U.S. Br. in *SWANCC* at 37-38 n.29 (discussing the decision below). The converse equally holds: if destruction of migratory bird habitat does *not* substantially affect commerce, neither does the taking of wolves. *See* Holman, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 139 (1995) ("*Lopez* poses a considerable threat to portions of the Endan-

gered Species Act (ESA) and the Clean Water Act (CWA), because these two federal environmental laws, as applied, lack a strong connection to interstate commerce").

1. In the event this Court reverses on the constitutional question in *SWANCC*, certiorari should be granted in this case, the decision below should be vacated, and the case should be remanded to the court of appeals for further consideration. If the migratory bird rule is held unconstitutional in *SWANCC*, grave doubts, to say the least, will be cast on the red wolf regulation challenged here. The court of appeals should be given the opportunity to reconsider its decision in light of the Court's decision in *SWANCC*.

2. Even if this Court were to affirm on the constitutional question in *SWANCC*, the Court should remand this case to the court of appeals.

SWANCC is the first case before this Court in which a federal regulation of wholly intrastate, noncommercial activities affecting wild animals has been directly challenged under the Commerce Clause. Yet there are several differences between this case and *SWANCC* which render the challenged regulation in the present case even further outside the scope of federal commerce power than that challenged in *SWANCC*.

First, the government claims in *SWANCC* that "[t]he proposed activity for which petitioner sought a federal permit—the filling of ponds in order to construct a municipal landfill—is plainly of a commercial nature." U.S. Br. in *SWANCC* at 43. Irrespective of the merits of this argument (which appears identical to one rejected in

Lopez, 514 U.S. at 561), it cannot save the regulation challenged in this case.

The red wolf regulation is not a regulation of commerce even under the distinction urged by the government in *SWANCC*. Just as in *Lopez*, *see* 514 U.S. at 567, there is "no reason to believe" that the activity prohibited by the red wolf regulation will be in any way "typical[ly]" commercial. U.S. Br. in *SWANCC* at 47 n.38. In practice just as in its plain text, the red wolf regulation applies to private residential properties and commercial ones with equal force and regularity. Indeed, FWS has recognized the threat posed by red wolves to human safety and private property, making the concerns affected by the red wolf regulation particularly noncommercial, and thus substantially more similar to *Morrison* and *Lopez* than *SWANCC*. *See* 63 Fed. Reg. 54151, 54152 (Oct. 8, 1998) (terminating red wolf release program in the Great Smoky Mountains National Park, noting that the red wolf is "a behaviorally unsuitable animal" which "represents a demonstrable ... threat to human safety"); 60 Fed. Reg. 18940, 18943 (Apr. 13, 1995) ("Wolves that come in close proximity to private residences may cause property damage by killing pets or removing and/or physically defacing small property items. In addition, private individuals may not want the animals on their property because they fear them or consider them a nuisance.").

Thus, even if the Court determines that the regulation in *SWANCC*, though lacking a jurisdictional "interstate commerce" element, is sufficiently related to commercial conduct to avoid the reach of *Lopez*, remand will be necessary to determine whether *this* case falls within the

ambit of *Lopez*, as clarified by the Court's decision in *SWANCC*.

Second, in *SWANCC* the government urges that the interstate *travel* of migratory birds alone is sufficient to trigger the federal commerce power, even without any showing of impact on interstate *commerce*. *See* U.S. Br. in *SWANCC* at 39 ("[Migratory birds] can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein.") (quoting *Missouri* v. *Holland*, 252 U.S, 416, 435 (1920)); *id.* at 40 ("Like water flowing in an interstate river, migratory birds constitute a natural resource . . . that has no permanent locus in a single State . . . [and thus] are appropriately regarded as a shared resource of the several States").

Justice Thomas has previously rejected such reasoning. *See Cargill*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari) (rejecting argument that "the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds"). But even were the Court to accept this novel interstate travel theory of the commerce power in *SWANCC*, such reasoning would not justify regulation of red wolves in the case at bar. There is no evidence that the red wolf looks to more than one State at a time for habitat. Indeed, FWS's regulation implementing the red wolf experimental program confirms that the geographical scope of the red wolf release is limited to a handful of counties in North Carolina, where they have adopted their "home ranges." *See* App., *infra*, 72a; *see also Nat'l Ass'n of Home*

Builders v. *Babbitt*, 130 F.3d 1041, 1058 (D.C. Cir. 1997) (Henderson, J., concurring) (rejecting similar argument); *id.* at 1063 (Sentelle, J., dissenting) (same).

Third, in upholding the migratory bird rule, the lower court in *SWANCC* relied on the government's determination that the rule was essential to protecting migratory bird species from the destruction of their habitat. *See SWANCC*, 191 F.3d at 850 ("the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce"). The anti-taking rule challenged in this case, by contrast, involves just one experimental red wolf population. Under the ESA, the Secretary must make a determination that such populations are not essential to the continuation of the species before embarking on a reintroduction program. *See* 16 U.S.C. § 1539(j)(2)(B); App., *infra*, 4a; *id.* at 60a n.2. Should the Court determine in *SWANCC* that the continued existence of wildlife species as a whole substantially affects commerce, remand to the court of appeals is necessary to determine whether the preservation of particular members of the species, deemed nonessential to the continuation of the species as a whole, also substantially affects commerce.

Fourth, the migratory birds in *SWANCC* inhabited or visited the petitioner's property at the time it was purchased. The red wolves in this case, by contrast, were introduced into petitioners' vicinity *by the federal government*. The government's suggestion that it can release wild (and dangerous) animals into areas adjacent to private land, and simultaneously assert federal jurisdiction to prohibit private landowners from interfering

with those animals, is nothing other than a bootstrap argument.

For these reasons, a decision on the constitutional question raised in *SWANCC* will provide further guidance to the court of appeals with respect to the red wolf program, necessitating remand *regardless* of how the Court actually rules on the constitutionality of the migratory bird rule.

III. In The Event The Court Does Not Reach The Constitutional Question In *SWANCC*, It Should Grant Certiorari In This Case

The petitioner in *SWANCC* has challenged not only the constitutionality of the Corps' migratory bird rule, but also the reasonableness of that rule as a construction of the Clean Water Act. It is therefore possible that the Court will reverse on the statutory issue without reaching the constitutional issue. If the Court does not reach the Commerce Clause question in *SWANCC*, this case presents an ideal vehicle for the resolution of that question.

1. Several courts of appeals have sustained the constitutionality of regulations promulgated under the ESA in the wake of *Lopez*. *See* App., *infra*, 1a-46a (upholding red wolf regulation); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding Delhi Sands Flower-Loving Fly regulation). *See also Palila* v. *Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (upholding Palila bird regulation before *Lopez*); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the Eagle Protection Act); *Building Indus. Assoc. of Superior Cal.* v. *Babbitt*, 979 F.

Supp. 893 (D.D.C. 1997) (upholding fairy shrimp regulation).

Those decisions, however, have drawn considerable criticism. Indeed, *every* court of appeals decision to have upheld an ESA regulation after *Lopez* has drawn a dissent (and in the D.C. Circuit, a critical separate concurrence as well). *See* App., *infra*, 46a (Luttig, J., dissenting); *Home Builders*, 130 F.3d at 1057 (Henderson, J., concurring); *id.* at 1060 (Sentelle, J., dissenting). These splintered decisions show that the lower courts are badly torn on the scope of federal power to regulate noncommercial activities affecting wildlife. This conflict warrants this Court's immediate attention.

In this case, the court below based its ruling upholding the red wolf regulation on several different theories of "substantial effects." The various theories came under severe criticism from Judge Luttig, however. In his dissent, Judge Luttig stated that the majority's decision relied on the kind of attenuated causation theories previously rejected in *Lopez* and *Morrison*, and in so doing "consigned" those decisions "to aberration." App., *infra*, 51a (Luttig, J., dissenting). He then criticized the majority's attempt to avoid *Lopez* and *Morrison* by claiming a strong national interest in wildlife preservation, stating: "The affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge." *Id.* at 55a (Luttig, J., dissenting).

Similarly, the D.C. Circuit upheld an ESA regulation protecting the Delhi Sands Flower-Loving Fly, but drew a scholarly dissent from Judge Sentelle. Moreover, the two judges who voted to uphold the regulation could not

even agree on a rationale for connecting the regulated activity with interstate commerce. Judge Wald concluded that the regulation protected biodiversity, and that biodiversity is an important commercial interest. *See Home Builders*, 130 F.3d at 1053 ("Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes."). This theory was rejected by Judge Henderson, however. *See id.* at 1058 (Henderson, J., concurring) ("it is . . . impossible to ascertain that there will be any [] impact [on commerce] at all" from biodiversity). Judge Henderson instead upheld the regulation on the ground that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce." *Ibid.* (Henderson, J., concurring). Writing in dissent, Judge Sentelle found the biodiversity and the "biodiversity affecting ecosystems" rationales indistinguishable, and rejected both as inconsistent with *Lopez*. *See id.* at 1065 (Sentelle, J., dissenting) ("neither Congress nor the litigants, nor for that matter Judge Wald, has pointed to any commercial activity being regulated, any commercial competition being unfairly challenged, or any other sort of commerce being destroyed by the taking of the fly").

Similar conflicts with respect to federal authority to regulate wildlife have arisen in the context of the Clean Water Act. The lower court in *SWANCC* concluded that the migratory bird rule bore a substantial relation to interstate commerce. *See* 191 F.3d at 849-51. That decision conflicted with *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997), creating a split in authority that this

Court may have granted certiorari in *SWANCC* to resolve.

As Justice Thomas explained in his dissent from the denial of certiorari in *Cargill, Inc.* v. *United States*, the argument that modifications of migratory bird habitat substantially affect interstate commerce is "even more farfetched than that offered, and rejected, in *Lopez*." 516 U.S. at 958. *See also Hoffman Homes*, 999 F.2d at 263 (Manion, J., concurring) ("The commerce power . . . is . . . not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink"); *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396 (9th Cir. 1995) ("The migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason"). These objections have the same force with respect to the red wolf regulation challenged in this case as with the migratory bird rule—as the government has already recognized. *See* U.S. Br. in *SWANCC* at 37-38 & n.29.

Given these serious disagreements in the lower courts, it is no surprise that the constitutionality of regulations promulgated under the ESA has drawn considerable scholarly attention. Indeed, numerous commentators have recognized that the constitutionality of certain endangered species programs, such as the red wolf regulation in this case, is doubtful in light of *Lopez* and *Morrison*. *See, e.g.*, Nagle, *The Commerce Clause Meets The Delhi Sands Flowers-Loving Fly*, 97 Mich. L. Rev. 174 (1998); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 Tex. Rev. L. & Pol. 365, 419 (1998); Warner, *The Po-*

tential Impact of United States v. Lopez *On Environmental Regulation*, 7 Duke Envtl L. & Policy Forum 321 (1997); Sherry, *The Barking Dog*, 46 Case W. Res. L. Rev. 877, 881 (1996) (describing the destruction of endangered species habitat by private landowners as "an activity only speculatively related to interstate commerce"); Holman, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 197 (1995).

The continuing uncertainty pervading the courts of appeals respecting the limits of the federal commerce power as regards wild animals cannot be tolerated, as this Court may already have concluded when it granted certiorari in *SWANCC*. Therefore, should the controversy in *SWANCC* be decided on statutory grounds alone, this case presents an ideal opportunity for the Court finally to resolve this important question of federal power.

2. Indeed, in light of the reasoning adopted by the court below, this case is particularly deserving of the Court's attention. The nexus between the red wolf regulation and interstate commerce is so attenuated that the lower court majority felt compelled to concoct a hypothetical commercial market in red wolf pelts in an effort to justify the exercise of the commerce power. Both the majority and FWS concede, however, that no such markets currently exist. *See* App., *infra*, 20a-21a ("[a]lthough . . . red wolves were sold for their pelts primarily in the nineteenth century, this temporal difference is beside the point"); C.A. App. 303 (September 1993 FWS environmental assessment report concluding that "[t]he red wolf is not expected to enter into com-

mercial production or to compete with any species that are harvested for commercial use," nor is it "expected to become a game species or to compete with presently taken game species").

This exercise in speculation exceeds what even the lower court in *SWANCC* was willing to do. This Court has never recognized that the mere possibility of a market appearing at some unknown time in the future is enough to satisfy the requirement of *substantial* effects on commerce today. To the contrary, as Judge Luttig correctly noted, the hypothetical market theory requires just the kind of speculation and blind inference this Court repudiated in *Lopez* and *Morrison*: "we are confronted here with an administrative agency regulation of an activity that . . . has had no economic character for well over a century now. [This is] [a]n activity that has no foreseeable economic character at all, except upon the baldest (though admittedly most humorous) of speculation that the red wolf pelt trade will once again emerge." App., *infra*, 53a (Luttig, J., dissenting). To state the matter simply, what might be in commerce some day is *not* in commerce today. An activity's effect on commerce at some unknown future date—indeed, a day that may *never* come—is too remote to survive scrutiny under *Lopez* and *Morrison*.

Moreover, the "hypothetical market" theory cannot stand in the face of the Court's unanimous decision last Term to construe the federal arson statute, in order to avoid constitutional problems, not to apply to private, owner-occupied residences, even though such residences might *someday* become rental properties. *Compare Jones* v. *United States*, 120 S. Ct. 1904 (2000) (refusing to apply federal arson statute to owner-occupied private

residence), *with Russell* v. *United States*, 471 U.S. 858 (1985) (applying federal arson statute to rental property). In doing so the Court necessarily rejected the government's assertion that the federal arson statute applies "even if the particular property victimized by crime is not at the time of the criminal act devoted to commercial activity, or itself on the market for rent or sale." U.S. Br. in *Jones* at 35-36.

3. The Court explained just last Term that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754; *see also Lopez*, 514 U.S. at 566, 567-68. The red wolf regulation, by asserting federal authority over the ability of North Carolinians to trap or otherwise "take" wild animals, unnecessarily intrudes into an area of purely local concern. In fact, the federal regulation purports to override a North Carolina state statute that specifically authorizes the taking of red wolves in certain circumstances. *See* App., *infra*, 8a-9a.

States have long asserted plenary authority over the wild animals within their borders. As the Court has explained, this is an incidence of sovereignty that has been exercised at least since Roman times. *Geer* v. *Connecticut*, 161 U.S. 519, 523-28 (1896); *see also Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 287-88 (1977) (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). This authority is exercised in a variety of ways, including the establishment of hunting seasons, the various schemes of fishing and other licenses required, limits on the size and number of animals that can be caught,

and the like. *See, e.g., Baldwin* v. *Montana Fish & Game Commission*, 436 U.S. 371 (1978).

The federal government's authority to regulate with respect to wild animals, by contrast, is limited to its enumerated powers. The federal government's property power, for example, authorizes it to proscribe harming wild animals on federal land. *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976). Similarly, the spending power authorizes the federal government to acquire, by purchase or easement, private land that may be used as animal habitat. *North Dakota* v. *United States*, 460 U.S. 300 (1983). The treaty power has been held to authorize the federal government to protect animals that are the subject of international concern. *Missouri* v. *Holland*, 252 U.S. 416 (1920). And the commerce power authorizes certain federal activity, such as regulating animals within the territorial waters (*i.e.*, the "channels" of commerce). *Seacoast Products*, 431 U.S. 265.

The commerce power, however, has *never* been held to authorize federal regulation of wild animals *qua* wild animals. In fact, precisely that argument was advanced by the Solicitor General in *Missouri* v. *Holland*, but was *rejected* by this Court. *Compare* 252 U.S. at 423 (argument for the United States) *with id.* at 433-34 (opinion of the Court). That is because such regulation is, and always has been, the province of the several States; and the Tenth Amendment and fundamental principles of comity dictate that the federal-state balance not be altered in this regard. The federal government has no more rightful place prohibiting the taking of red wolves in North Carolina, where such activity is expressly authorized by state law, than it has regulating the deer-hunting season in Virginia or the ability to fish in

Alaska's intrastate waters. Regulation of wild animals, including human interactions with animals on private property, remains a matter of state concern that is outside the powers conferred on Congress. As a result, the red wolf regulation cannot be sustained as a valid exercise of federal authority. *See Morrison*, 120 S. Ct. at 1748; *Lopez*, 514 U.S. at 567-68.

4. This case is not an attack on the entire scheme of federal environmental regulation. Indeed, the red wolf regulation is not even essential to the continuation of the species *Canis rufus*, or any other. *See* 16 U.S.C. § 1539(j)(2)(B). Judge Luttig correctly explained the narrowness of the issues in this case:

> While it could be lost in a reading of the majority opinion, we do not address here Congress' power over either the channels or instrumentalities of interstate commerce. We do not address activity that is interstate in character. We do not address in this case a statute or a regulation with an express interstate commerce jurisdictional requirement, which would all but ensure constitutional validity. We do not have before us an activity that has obvious economic character and impact, such as is typically the case with non-wildlife natural resources, and even with other wildlife resources. We are not even presented with an activity as to which a plausible case of future economic character and impact can be made.
>
> To the contrary, we are confronted here with an administrative agency regulation of an activity that implicates but a handful of animals, if even that, in one small region of one state. An activity

> that not only has no current economic character, but one that concededly has had no economic character for well over a century now. . . . And, importantly, an activity that Congress could plainly regulate under its spending power and under its power over federal lands, regardless.

App., *infra*, 52a-53a.

Even after *Lopez* and *Morrison*, there is significant disagreement over the extent to which the Commerce Clause confers authority upon the federal government to regulate wholly intrastate, noncommercial activities that may impact wildlife. Prompt resolution of this important and recurring issue is necessary to give lower courts much-needed guidance.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178, and then remanded to the court of appeals for further consideration in light of the Court's resolution of the Commerce Clause issue in that case. In the event the Court does not reach the constitutional question in *SWANCC*, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 24, 2000.

APPENDIX

No. 99-1218

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES GILBERT GIBBS; RICHARD LEE MANN, III; HYDE COUNTY, NORTH CAROLINA; WASHINGTON COUNTY, NORTH CAROLINA,

Plaintiffs-Appellants,

v.

BRUCE BABBITT, Secretary of the Interior, in his official capacity; UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; JAMIE CLARK, Director of the U.S. Fish and Wildlife Service,

Defendants-Appellees,

DEFENDERS OF WILDLIFE,

Intervenor-Appellee.

PACIFIC LEGAL FOUNDATION; NATIONAL WILDERNESS INSTITUTE; WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATION FOUNDATION; NATIONAL WILDLIFE FEDERATION; NORTH CAROLINA WILDLIFE FEDERATION; ENVIRONMENTAL DEFENSE FUND; WORLD WILDLIFE FUND; CENTER FOR MARINE CONSERVATION,

Amici Curiae.

Decided June 6, 2000

WILKINSON, Chief Judge:

In this case we ask whether the national government can act to conserve scarce natural resources of value to our entire country. Appellants challenge the constitutionality of a Fish and Wildlife Service regulation that limits the taking of red wolves on private land. The district court upheld the regulation as a valid exercise of federal power under the Commerce Clause. We now affirm because the regulated activity substantially affects interstate commerce and because the regulation is part of a comprehensive federal program for the protection of endangered species. Judicial deference to the judgment of the democratic branches is therefore appropriate.

I.

A.

In response to growing concern over the extinction of many animal and plant species, Congress enacted the Endangered Species Act of 1973 (ESA), Pub. L. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1994 & Supp. III 1997)). Congress found that many of the species threatened with extinction are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3) (1994). Congress also found that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." *Id.* § 1531(a)(1). To address these national concerns, the ESA sets forth a comprehensive regulatory scheme to conserve these species and the ecosystems upon which they depend. The Act

provides, *inter alia*, for the listing of "endangered" and "threatened" species, *id.* § 1533, and various recovery plans for the "conservation and survival" of listed species, *id.* § 1533(f).

The cornerstone of the statute is section 9(a)(1), which prohibits the taking of any endangered species without a permit or other authorization. *Id.* § 1538(a)(1)(B). The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). The ESA also authorizes the Fish and Wildlife Service (FWS) to issue any necessary regulations for the conservation of threatened species. *Id.* § 1533(d). Finally, in keeping with its commitment to species conservation, the ESA states that a state law may be more restrictive than the provisions of the Act, but not less. *Id.* § 1535(f).

In order to increase the Service's flexibility in reintroducing endangered species into portions of their historic range, Congress extensively amended the ESA in 1982, Pub. L. 97-304, 96 Stat. 1426. Prior to 1982, reintroduced species were treated the same as any other endangered species. *See id.* § 1536 & 1538(a) (providing for stringent consultation and reporting requirements and a near absolute prohibition on the taking of endangered species). These strict limits led to significant local opposition to the reintroductions. In response to these problems, Congress added section 10(j), which allows the FWS to designate as "experimental" some reintroduced populations of endangered or threatened species. *Id.* § 1539(j). Under the looser standards of section 10(j), members of an experimental population are generally to be treated as threatened rather than endangered.

Id. § 1539(j)(2)(C). This means that protective regulations may be established for their conservation. *See id.* at 1533(d). By promulgating special rules for an experimental population the Service can determine which prohibitions and exceptions shall apply. *See* 50 C.F.R. § 17.82 (1998).

A population may be designated as "experimental" only after the Service determines that it is not "essential" to the continuation of the species. *Id.* § 1539(j)(2)(B). An experimental population located on private land can be exempt from some of the more stringent requirements for endangered species. *See id.* § 1539(j)(2)(C)(i). If a population is found to be "non-essential" and is designated as "experimental," the FWS can develop "special regulations for each experimental population that will address the particular needs of that population." H.R. Rep. No. 97-567, at 34 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2834. Furthermore, "there will be instances where the regulations allow for the incidental take of experimental populations." *Id.* Thus, under section 10(j), the FWS has the authority to promulgate regulations allowing the taking of experimental reintroduced populations under limited circumstances.

B.

The red wolf, *Canis rufus*, is an endangered species whose protection is at issue in this case. The red wolf was originally found throughout the southeastern United States. It was once abundant in the "riverine habitats of the southeast," and was especially numerous near the "canebrakes" that harbored large populations of swamp and marsh rabbits, the primary prey of the red wolf. 51 Fed. Reg. 41,790, 41,791 (1986). The FWS found that "the demise of the red wolf was directly related to man's

activities, especially land changes, such as the drainage of vast wetland areas for agricultural purposes . . . and predator control efforts at the private, State, and Federal levels." *Id.*

Activities such as wetlands drainage, dam construction, and hunting reduced the red wolf to such meager numbers that it was listed as endangered in 1976. *See* 32 Fed. Reg. 4001 (1976). Because of the paucity of animals left in the wild, their poor physical condition, and the threats posed by inbreeding, the FWS decided to trap the remaining red wolves in the mid-1970s and place them in a captive breeding program. *See* 51 Fed. Reg. at 41,791. The breeding program anticipated the eventual reintroduction of some red wolves into the wild. *Id.*

In 1986, the FWS issued a final rule outlining a reintroduction plan for red wolves in the 120,000-acre Alligator River National Wildlife Refuge in eastern North Carolina. *See* 51 Fed. Reg. 41,790. This area was judged the ideal habitat within the red wolf's historic range. *Id.* at 41,791. Between 1987 and 1992, a total of 42 wolves were released in the Refuge. In 1993, the reintroduction program was expanded to include the release of red wolves in the Pocosin Lakes National Wildlife Refuge in Tennessee. Since reintroduction, some red wolves have wandered from federal refuges onto private property. From available data, as of February 1998 it was estimated that about 41 of the approximately 75 wolves in the wild may now reside on private land.[1]

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[1] The Service notes that the red wolf population lies between 53 and 101 wolves, and estimates that the actual population

[Footnote continued on next page]

This case raises a challenge to 50 C.F.R. § 17.84(c), a regulation governing the experimental populations of red wolves reintroduced into North Carolina and Tennessee pursuant to section 10(j). The FWS has extended the takings prohibitions of section 9(a)(1) to the experimental red wolf populations with certain exceptions. *See* 50 C.F.R. § 17.84(c) (1998). As noted above, the taking provision of section 9(a)(1) prevents landowners from harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting any endangered species. *See* 16 U.S.C. § 1532(19). However, in order to insure that other agencies and the public would accept the proposed reintroduction, the FWS relaxed the taking standards for wolves found on private land under its authority over experimental populations.

Section 17.84(c) allows a person to take red wolves on private land "provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others." *Id.* § 17.84(c)(4)(i). Private landowners may also take red wolves on their property "when the wolves are in the act of killing livestock or pets, Provided that freshly wounded or killed livestock or pets are evident." *Id.* § 17.84(c)(4)(iii). A landowner may also "harass red wolves found on his or her property . . . Provided that all such harassment is by methods that are not lethal or injurious to the red wolf." *Id.* § 17.84(c)(4)(iv). Finally, landowners may take red

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[Footnote continued from previous page]
is between 70 and 80 animals. The district court also found that approximately 75 red wolves were living in the wild in eastern North Carolina. *See Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 534 (E.D.N.C. 1998).

wolves after efforts by Service personnel to capture such animals have been abandoned, and such taking has been approved in writing. *Id.* § 17.84(c)(4)(v). All of these exceptions to the taking prohibition are subject to a 24-hour reporting requirement. *Id.* § 17.84(c)(4).

C.

In October 1990, plaintiff Richard Lee Mann shot a red wolf that he feared might threaten his cattle. The federal government prosecuted Mann under § 17.84(c), and Mann pled guilty. Mann's prosecution triggered some opposition to the red wolf program in the surrounding communities. After the program was in place for several years, the FWS held meetings with local governments and the public to receive feedback about the reintroductions. The Service contended that most people who commented expressed support for the program and that the reintroductions were generally supported by local, state and federal agencies, and elected officials. *See* 58 Fed. Reg. 62,086, 62,088 (1993). In addition, owners of nearly 200,000 acres of private land have permitted red wolves onto their land through agreements with the FWS. Nonetheless, Hyde and Washington Counties, and the towns of Belhaven and Roper, passed resolutions opposing the reintroduction of the wolves. The resolutions appeared to be based on the farming community's fears of prohibitions on private land use. *Id.*

In response to discontent with the reintroduction program, the North Carolina General Assembly passed a bill entitled "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." The Act makes it lawful to kill a red wolf on private property if the landowner has previously requested the FWS to re-

move the red wolves from the property. *See* 1994 N.C. Sess. Laws Ch. 635, amended by 1995 N.C. Sess. Laws Ch. 83 (adding Beaufort and Craven Counties to the Act, which initially covered only Hyde and Washington Counties). This law facially conflicts with the federal regulation. For instance, § 17.84(c) allows the taking of red wolves "when the wolves are in the act of killing livestock or pets," when wounded or dead livestock or pets are evident and the taking is reported within 24 hours. *See* 50 C.F.R. § 17.84(c)(4)(iii). By contrast, the North Carolina statute makes it lawful to kill a red wolf on private property when the landowner "reasonably believes" that the wolf may be a threat to people or livestock and the "landowner has previously requested the [FWS] to remove the red wolves from the landowner's property." *See* 1994 N.C. Sess. Laws Ch. 635, § 1. The government reports, however, that no actual conflicts between these laws have arisen, because there have been no contested state or federal prosecutions for unlawful takes since the North Carolina statute was enacted.

Appellants Charles Gibbs, Richard Mann, Hyde County, and Washington County filed the instant action challenging the federal government's authority to protect red wolves on private land. They seek a declaration that the anti-taking regulation, 50 C.F.R. § 17.84(c), as applied to the red wolves occupying private land in eastern North Carolina, exceeds Congress's power under the interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3 ("Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."). Appellants also seek an injunction against continued enforcement of the anti-taking regulation on non-federal land. Appellants claim

that the red wolves have proven to be a "menace to citizens and animals in the Counties." They further allege that because of the federal regulatory protections surrounding the wolves, North Carolinians cannot effectively defend their property.

On cross-motions for summary judgment, the United States District Court for the Eastern District of North Carolina held that Congress's power to regulate interstate commerce includes the power to regulate conduct that might harm red wolves on private land. *See Gibbs v. Babbitt*, 31 F. Supp. 2d 531 (E.D.N.C. 1998). The district court found that the red wolves are "things in interstate commerce" because they have moved across state lines and their movement is followed by "tourists, academics, and scientists." *Id.* at 535. The court also found that the tourism they generate substantially affects interstate commerce. *See id.* The private landowners and North Carolina Counties now appeal.

II.

We consider this case under the framework articulated by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 120 S. Ct. 1740, 2000 WL 574361 (2000), *aff'g Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999). While Congress's power to pass laws under the Commerce Clause has been interpreted broadly, both *Lopez* and *Morrison* reestablish that the commerce power contains "judicially enforceable outer limits." *See Lopez*, 514 U.S. at 566; *Morrison*, 2000 WL 574361, at *6. It is essential to our system of government that the commerce power not extend to effects on interstate commerce that are so remote that we "would effectually obliterate the distinction between

what is national and what is local." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Indeed, the judiciary has the duty to ensure that federal statutes and regulations are promulgated under one of the enumerated grants of constitutional authority. It is our further duty to independently evaluate whether "a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce." *Lopez*, 514 U.S. at 557.

While this is rational basis review with teeth, the courts may not simply tear through the considered judgments of Congress. Judicial restraint is a long and honored tradition and this restraint applies to Commerce Clause adjudications. "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 2000 WL 574361, at *6. In fact, "the substantial element of political judgment in Commerce Clause matters leaves our institutional capacity more in doubt than when we decide cases, for instance, under the Bill of Rights." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring). We must enforce the structural limits of Our Federalism, but we must also defer to the political judgments of Congress, recognizing that the "Commerce Clause represents a broad grant of federal authority." *Brzonkala v. Virginia Polytechnic Instit. and State Univ.*, 169 F.3d 820, 830 (4th Cir. 1999), *aff'd sub nom. Morrison*, 2000 WL 574361.

The *Lopez* Court recognized three broad categories of activity that Congress may regulate under its commerce power. 514 U.S. at 558. "First, Congress may regulate the use of the channels of interstate commerce.

Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59 (citations omitted).

Section 17.84(c) is "not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce." *Lopez*, 514 U.S. at 559. The term "channel of interstate commerce" refers to, *inter alia*, "navigable rivers, lakes, and canals of the United States; the interstate railroad track system; the interstate highway system; . . . interstate telephone and telegraph lines; air traffic routes; television and radio broadcast frequencies." *United States v. Miles*, 122 F.3d 235, 245 (5th Cir. 1997). This regulation of red wolf takings on private land does not target the movement of wolves or wolf products in the channels of interstate commerce.

This case also does not implicate *Lopez*'s second prong, which protects things in interstate commerce. Although the Service has transported the red wolves interstate for the purposes of study and the reintroduction programs, this is not sufficient to make the red wolf a "thing" in interstate commerce. *See, e.g., Lopez*, 514 U.S. at 559 (rejecting application of prong two to Gun-Free School Zones Act, despite the fact that the regulated guns likely traveled through interstate commerce); *National Assoc. of Home Builders v. Babbitt*, 130 F.3d

1041, 1046 (D.C. Cir. 1997) ("NAHB") (rejecting notion that Delhi Sands Flower-Loving Fly was a "thing" in interstate commerce). Therefore, if 50 C.F.R. § 17.84(c) is within the commerce power, it must be sustained under the third prong of *Lopez*.

Under the third *Lopez* test, regulations have been upheld when the regulated activities "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. In *Morrison*, the Supreme Court noted, "In every case where we have sustained federal regulation under Wickard's aggregation principle, the regulated activity was of an apparent commercial character." *Morrison*, 2000 WL 574361, at *37 n.4. The Court in *Lopez* likewise placed great emphasis on the "commercial concerns that are central to the Commerce Clause." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also Hoffman v. Hunt*, 126 F.3d 575, 586-87 (4th Cir. 1997) (noting the importance of the distinction between "the regulation of, on the one hand, those activities that are commercial or economic in nature . . . and, on the other hand, those activities that are not").

Although the connection to economic or commercial activity plays a central role in whether a regulation will be upheld under the Commerce Clause, economic activity must be understood in broad terms. Indeed, a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority. The *Lopez* Court's characterization of the regulation of home-grown wheat in *Wickard v. Filburn*, 317 U.S. 111 (1942), as a case involving economic activity makes clear the breadth of this concept. The Court

explained that "even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560; *accord Morrison*, 2000 WL 574361, at *7. *See also Brzonkala*, 169 F.3d at 835 (explaining that the Court has a "relatively broad understanding of such [economic] activity"). In fact, our understanding of commerce may not be limited to its "18th-century" forms. *See Lopez*, 514 U.S. at 574 (Kennedy, J., concurring). While we must enforce meaningful limits on the commerce power, we must also be mindful of the "Court's relatively generous conception of economic activity." *Brzonkala*, 169 F.3d at 835.

Lopez and *Morrison* rest on the principle that where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power. Respect for our federal system of government was integral to those decisions. *See Lopez*, 514 U.S. at 561 n.3; *Morrison*, 2000 WL 574361, at *11. Yet Lopez also counsels that "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 514 U.S. at 560. In enforcing limits on the Congress, we must be careful not to overstep the judicial role. To strike down statutes that bear substantially upon commerce is to overstep our own authority even as we fault Congress for exceeding limits on its power. The irony of disregarding limits on ourselves in the course of enforcing limits upon others will assuredly not be lost on those

who look to courts to respect restraints imposed by rules of law.

With these basic principles in mind, we consider appellants' challenge to § 17.84(c).

III.

Appellants argue that the federal government cannot limit the taking of red wolves on private land because this activity cannot be squared with any of the three categories that Congress may regulate under its commerce power. Appellants assert that 50 C.F.R. § 17.84(c) is therefore beyond the reach of congressional authority under the Commerce Clause.

We disagree. It was reasonable for Congress and the Fish and Wildlife Service to conclude that § 17.84(c) regulates economic activity. The taking of red wolves implicates a variety of commercial activities and is closely connected to several interstate markets. The regulation in question is also an integral part of the overall federal scheme to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country. Invalidating this provision would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans.

A.

To fall within Congress's commerce power, this regulation must have a "substantial relation to interstate commerce"—it must "substantially affect interstate commerce." *Lopez*, 514 U.S. at 559. The Supreme Court recently emphasized that "in those cases where we

have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 2000 WL 574361, at *8. Intrastate activities may be subject to federal regulation if they have a "meaningful connection with a particular, identifiable economic enterprise or transaction." *Brzonkala*, 169 F.3d at 834. We therefore must consider whether the taking of red wolves on private land is "in any sense of the phrase, economic activity." *Morrison*, 2000 WL 574361, at *9.

Unlike the Violence Against Women Act (VAWA) in *Morrison* and the Gun-Free School Zones Act (GFSZA) in *Lopez*, § 17.84(c) regulates what is in a meaningful sense economic activity. The Court in *Morrison* explained that both the VAWA and the GFSZA involved activity that was noneconomic and only tenuously linked to interstate commerce. 2000 WL 574361, at *7-9. Yet the taking of a red wolf on private land is unlike gender-motivated violence or guns near schools. The protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops. Indeed, appellants' arguments focus quite explicitly on these economic concerns—they want freer rein to protect their property and investments in the land. *See* Appellants' Br. at 10 ("In the face of these threats [from red wolves], North Carolinians cannot effectively defend their property."); *id.* at 12.

The relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific

research, and no commercial trade in pelts. We need not "pile inference upon inference," *Lopez*, 514 U.S. at 567, to reach this conclusion. While a beleaguered species may not presently have the economic impact of a large commercial enterprise, its eradication nonetheless would have a substantial effect on interstate commerce. And through preservation the impact of an endangered species on commerce will only increase.[2]

Because the taking of red wolves can be seen as economic activity in the sense considered by *Lopez* and *Morrison*, the individual takings may be aggregated for the purpose of Commerce Clause analysis. *See Morrison*, 2000 WL 574361, at *37 n.4. While the taking of one red wolf on private land may not be "substantial," the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold this regulation. This is especially so where, as here, the regulation is but one part of the broader scheme of endangered species legislation.

Further, § 17.84(c) is closely connected to a variety of interstate economic activities.[3] Whether the impact

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[2] While the regulation might also reflect a moral judgment concerning the importance of rehabilitating endangered species, this does not undermine the economic basis for the regulation. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

[3] The Supreme Court has admonished us that "the task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that

[Footnote continued on next page]

of red wolf takings on any one of these activities qualifies as a substantial effect on interstate commerce is something we need not address. We have no doubt that the effect of the takings on these varied activities in combination qualifies as a substantial one. The first nexus between the challenged regulation and interstate commerce is tourism. The red wolves are part of a $29.2 billion national wildlife-related recreational industry that involves tourism and interstate travel. *See Heart of Atlanta Motel*, 379 U.S. at 256 (finding it is well-established that "commerce among the States . . . consists of intercourse and traffic between their citizens" (internal quotation marks omitted)). Many tourists travel to North Carolina from throughout the country for "howling events"—evenings of listening to wolf howls accompanied by educational programs. These howlings are a regular occurrence at the Alligator River National Wildlife Refuge. According to a study conducted by Dr. William E. Rosen of Cornell University, the recovery of the red wolf and increased visitor activities could result in a significant regional economic impact. *See* William E. Rosen, *Red Wolf Recovery in Northeastern North Carolina and the Great Smoky Mountains National Park: Public Attitudes and Economic Impacts* (unpublished, Joint Appendix at 633). Rosen estimates that northeastern North Carolina could see an increase of between $39.61 and $183.65 million per year in tourism-related activities, and that the Great Smoky Mountains National Park could see an increase of between $132.09

[Footnote continued from previous page]
a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 276 (1981).

and $354.50 million per year. This is hardly a trivial impact on interstate commerce. Appellants understandably seek to criticize the Rosen study, but concede that the howling events attract interstate tourism and that red wolf program volunteers come from all around the country.

While there are no formal congressional findings that the ESA affects interstate commerce, such findings are neither necessary nor sufficient to sustain a statute or regulation. In *Lopez*, the Court said that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." 514 U.S. at 562; *see also Perez v. United States*, 402 U.S. 146, 156 (1971) (particularized findings are not necessary for Congress to legislate). Further, in *Morrison*, the Court emphasized in the face of voluminous congressional findings that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." 2000 WL 574361, at *10.

In evaluating whether there is a rational basis for the promulgation of a statute or regulation under the commerce power, we often consider congressional committee findings. *See Lopez*, 514 U.S. at 562. Here, Congress has provided numerous sources of informal findings. Committee reports and legislative debates have emphasized the importance of endangered species to interstate commerce. We independently evaluate the constitutionality of this regulation, but we also take account of congressional judgment and the judgment of the agency designated to implement the statute.

Appellants argue that the tourism rationale relates only to howling events on national park land or wildlife

refuges because people do not travel to private land. They reason that without tourism on private land the regulated activity does not substantially affect interstate commerce. Yet this argument misses the mark. Since reintroduction, red wolves have strayed from federal lands onto private lands. Indeed, wolves are known to be "great wanderers." *See* 60 Fed. Reg. 18,940, 18,943 (1995). In 1998, it was estimated that 41 of the 75 wolves in the wild now live on private land. Because so many members of this threatened species wander on private land, the regulation of takings on private land is essential to the entire program of reintroduction and eventual restoration of the species. Such regulation is necessary to conserve enough red wolves to sustain tourism. Appellants in fact seem unmindful of the history of endangered species regulation. The Endangered Species Acts of 1966 and 1969 initially targeted conservation efforts only on federal lands, but they met with limited success. *See* Note, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 Geo. Int'l Envtl. L. Rev. 441, 449-53 (1993). The Endangered Species Act of 1973 was motivated in part by the need to extend takings regulation beyond the limited confines of federal land. *See id.* at 556. The prohibition of takings on private land was critical to the overall success of the ESA in halting and reversing the near extinction of numerous species. *See* 16 U.S.C. § 1538(a)(1). The success of many commercial enterprises depends on some regulation of activity on private land, and interstate tourism is no exception.

Tourism, however, is not the only interstate commercial activity affected by the taking of red wolves. The

regulation of red wolf takings is also closely connected to a second interstate market—scientific research. Scientific research generates jobs. It also deepens our knowledge of the world in which we live. The red wolf reintroduction program has already generated numerous scientific studies. For example, the red wolf is used as a model for other carnivore reintroductions. *See* Donald E. Moore III & Roland Smith, *The Red Wolf as a Model for Carnivore Re-introductions*, 62 Symp. Zool. Soc. Lond. 263 (1990). Scientists have also studied how the red wolf affects small mammal populations and how the wolves interact with the ecosystem as a whole. *See, e.g.*, Bryan T. Kelly, *Alligator River National Wildlife Refuge Red Wolf (Canis Rufus) Scat Analysis: Preliminary Analyses of Mammalian Prey Consumed by Year, Season, Pack, Sex, and Age* (April 1994) (unpublished, Joint Appendix at 942). By studying the effects of red wolves on the ecosystem, scientists learn about the interdependence of plants and animals, as well as how other threatened species may be reintroduced in the future. Scientific research can also reveal other uses for animals—for instance, approximately 50 percent of all modern medicines are derived from wild plants or animals. *See* Norman Myers, *A Wealth of Wild Species: Storehouse for Human Welfare* 4 (1983). Protection of the red wolves on private land thus encourages further research that may have inestimable future value, both for scientific knowledge as well as for commercial development of the red wolf.

The anti-taking regulation is also connected to a third market—the possibility of a renewed trade in fur pelts. Wolves have historically been hunted for their pelts. *See* Stanley P. Young & Edward A. Goldman, *The*

Wolves of North America I, 165-70 (1964). Congress had the renewal of trade in mind when it enacted the ESA. The Senate Report noted that the protection of an endangered species "may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels." S. Rep. No. 91-526, at 3 (1969), reprinted in 1969 U.S.C.C.A.N. 1413, 1415. The American alligator is a case in point. In 1975, the American alligator was nearing extinction and listed as endangered, but by 1987 conservation efforts restored the species. Now there is a vigorous trade in alligator hides. *See* Catharine L. Krieps, *Sustainable Use of Endangered Species Under CITES: Is it a Sustainable Alternative?*, 17 U. Pa. J. Int'l Econ. L. 461, 479-80 (1996) (explaining that many environmentalists are now encouraging the purchase of alligator products to create an incentive for protecting alligators and their habitats). Although alligator hides have more recently been a part of interstate commercial trade and red wolves were sold for their pelts primarily in the nineteenth century, this temporal difference is beside the point. It is not for the judiciary to move from species to species, opining that species A possesses great commercial potential, but species B does not. Assessing the relative scientific value and commercial impact of alligators and red wolves is for Congress and the FWS, informed as they are by biologists, economists, and others whose expertise is best delivered to the political branches, not the courts.

Finally, the taking of red wolves is connected to interstate markets for agricultural products and livestock. For instance, appellant landowners find red wolves a menace because they threaten livestock and other animals of economic and commercial value. By restricting the taking of red wolves, § 17.84(c) is said to impede economic development and commercial activities such as ranching and farming. This effect on commerce, however, still qualifies as a legitimate subject for regulation. It is well-settled under Commerce Clause cases that a regulation can involve the promotion or the restriction of commercial enterprises and development. Indeed, "the motive and purpose of a regulation of interstate commerce are matters for the legislative judgment." *United States v. Darby*, 312 U.S. 100, 115 (1941). We recognize that "Congress can regulate interstate commerce for any lawful motive." *United States v. Soderna*, 82 F.3d 1370, 1374 (7th Cir. 1996). The regulation here targets takings that are economically motivated—farmers take wolves to protect valuable livestock and crops. It is for Congress, not the courts, to balance economic effects—namely whether the negative effects on interstate commerce from red wolf predation are outweighed by the benefits to commerce from a restoration of this species. To say that courts are ill-suited for this act of empirical and political judgment is an understatement.

It is anything but clear, for example, that red wolves harm farming enterprises. They may in fact help them, and in so doing confer additional benefits on commerce. For instance, red wolves prey on animals like raccoons, deer, and rabbits—helping farmers by killing the animals that destroy their crops. *See* Robert J. Esher &

Theodore R. Simons, R*ed Wolf Propagation on Horn Island, Miss.: Red Wolf Ecological Studies* 13-16 (Sept. 1993) (unpublished, Joint Appendix at 890). On Horn Island, for instance, researchers found evidence of increased shore bird nesting, likely due to the reduction in raccoon predation. *See id.* at 15. In *Tennessee Valley Authority v. Hill ("TVA")*, the Supreme Court recognized that one of Congress's primary concerns in enacting the ESA was "the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet." 437 U.S. 153, 178-79 (1978). It is within the power of Congress to regulate the coexistence of commercial activity and endangered wildlife in our nation and to manage the interdependence of endangered animals and plants in large ecosystems. It is irrelevant whether judges agree or disagree with congressional judgments in this contentious area. Given the existing economic and commercial activity involving red wolves and wildlife generally, Congress could find that conservation of endangered species and economic growth are mutually reinforcing. It is simply not beyond the power of Congress to conclude that a healthy environment actually boosts industry by allowing commercial development of our natural resources.

Section 17.84(c) aims to reverse threatened extinction and conserve the red wolf for both current and future use in interstate commerce. Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained. The Supreme Court has held that the congressional decision to maintain abandoned railroad track is reasonable "even if no future rail use for it is currently foreseeable."

Preseault v. ICC, 494 U.S. 1, 19 (1990). The Court reasoned that "given the long tradition of congressional regulation of railroad abandonments, that is a judgment that Congress is entitled to make." *Id.* (citations omitted). Similarly, Congress has long been involved in the regulation of scarce and vital natural resources. The full payoff of conservation in the form of tourism, research, and trade may not be foreseeable. Yet it is reasonable for Congress to decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss.

When enacting the ESA, various legislators expressed these exact concerns, namely that species be conserved for future scientific development:

> The value of this genetic heritage is, quite literally, incalculable. . . . From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. . . . Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious.

H.R. Rep. No. 93-412, at 4-5 (1973). Extinction, after all, is irreversible. If a species becomes extinct, we are left to speculate forever on what we might have learned or what we may have realized. If we conserve the species, it will be available for the study and benefit of future generations. In any event, it is for Congress to

choose between inaction and preservation, not for the courts.

Courts have uniformly upheld endangered species legislation after *Lopez* based on many of the same current and future connections to interstate commerce articulated here. In fact, no case has been brought to our attention that invalidates any endangered species regulation for exceeding the commerce power. In addressing a post-*Lopez* challenge to the constitutionality of the Bald Eagle Protection Act, 16 U.S.C. § 668 (1994), the Ninth Circuit found that "extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material." *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996). Similarly, "given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce." *See NAHB*, 130 F.3d at 1059 (Henderson, J., concurring). In addition, the District of Columbia District Court upheld application of the ESA to the fairy shrimp, a severely endangered species limited to one state. *See Building Indus. Assoc. of Superior Cal. v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997). The court declined to "read *Lopez* as hamstringing Congress in such an irrational fashion in a regulatory area of such important economic, scientific and environmental dimensions." *Id.* at 908. Pre-*Lopez*

cases reached similar results. *See, e.g., Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 261 (7th Cir. 1993); *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

The protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities. To overturn this regulation would start courts down the road to second-guessing all kinds of legislative judgments. There is a "rational basis" as defined by *Lopez* for sustaining this regulation. We therefore hold that the anti-taking provision at issue here involves regulable economic and commercial activity as understood by current Commerce Clause jurisprudence.[4]

B.

This regulation is also sustainable as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The Supreme Court in *Hodel v. Indiana* stated: "A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that

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[4] Intervenor-appellees Defenders of Wildlife argue that this regulation can also be upheld under the treaty power. *See* U.S. Const. art. VI., cl. 2; U.S. Const. art. II, § 2, cl. 2. Because we hold that § 17.84(c) is valid under the Commerce Clause, we need not address this alternative argument.

the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." 452 U.S. 314, 329 n.17 (1981).

The FWS issued this regulation pursuant to the provisions of the Endangered Species Act, a comprehensive and far-reaching piece of legislation that aims to conserve the health of our national environment. Congress undoubtedly has the constitutional authority to pass legislation for the conservation of endangered species. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995) (presupposing validity of Endangered Species Act in upholding broad definition of "harm" as including significant habitat modification); *see also TVA v. Hill*, 437 U.S. at 194 (emphasizing that Congress has struck a balance in "favor of affording endangered species the highest of priorities" and upholding application of the ESA because "once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end").

Appellants repeatedly argue that individual takings of red wolves have only an insubstantial effect on interstate commerce and therefore that the application of the regulation to private landowners is invalid. But we emphasize that the effect on commerce must be viewed not from the taking of one wolf, but from the potential commercial differential between an extinct and a recovered species. A single red wolf taking may be insubstantial by some measures, but that does not invalidate a regulation that is part of the ESA and that seeks conservation not only of any single animal, but also recovery of the species as a whole. The Supreme Court in *Lopez* was emphatic on this point: "'where a general regulatory

statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" 514 U.S. at 558 (alteration in original) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)); *see also Perez v. United States*, 402 U.S. 146, 154 (1971) ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." (internal quotation marks omitted)).

Once a species has been designated as endangered, there are by definition only a few remaining animals. Therefore, the effects on interstate commerce should not be viewed from the arguably small commercial effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species. Each taking impacts the overall red wolf population, which has an effect on many dimensions of commerce between the states. As the Supreme Court has stated, "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Heart of Atlanta Motel*, 379 U.S. at 258 (internal quotation marks omitted). Section 17.84(c) must thus be evaluated against the overall congressional goal of restoring red wolves and endangered species generally. It would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power. Yet under appellants' theory, the more endangered the species, the less authority Congress has to regulate the taking of it. According to this view, endangered species would lie beyond congressional protection because there are too

few animals left to make a commercial difference. Such reasoning would eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head.

Appellants protest they do not ask us to overturn the ESA. They simply want us to excise as unconstitutional a disfavored provision that places a strain on their agricultural activities. But given that Congress has the ability to enact a broad scheme for the conservation of endangered species, it is not for the courts to invalidate individual regulations. If appellants think this regulation unwise, they must make their plea to Congress. The judiciary lacks the delegated powers of the FWS or the Environmental Protection Agency. Separation of powers principles mandate that we leave decisions such as these to Congress and to agencies with congressionally sanctioned expertise and authority. The Supreme Court itself has been mindful of the "degree of regulatory expertise necessary to [the ESA's] enforcement." *Sweet Home*, 515 U.S. at 703. Lacking such expertise, we must decide not whether the regulation meets with judicial favor, but whether it passes constitutional muster.

The specific needs of individual species, as well as the balance to be struck with landowners in or near the species' habitats, present a classic case for legislative balancing. Here § 17.84(c) was promulgated precisely so that private landowners could take red wolves under certain circumstances. For instance, subject to certain reporting requirements, landowners can "take" wolves in self-defense, *see* 50 C.F.R. § 17.84(c)(4)(i), or when the wolves are found in the act of killing livestock or pets, *see id.* § 17.84(c)(4)(iii). Landowners can also harass wolves found on private property, provided that harass-

ment is by methods that are not lethal or physically injurious to the red wolf, *see id.* § 17.84(c)(4)(iv). These provisions may ease tensions between the red wolves and private landowners. Without these special regulations, all red wolves would be subject to the absolute taking prohibition of section 9(a), placing a much greater burden on the property owner. Congress and the Service have decided that these experimental wolves can be taken under certain circumstances based on an evaluation of competing interests. How these lines should be drawn and this balance struck is grist for the legislative and administrative mill and beyond the scope of judicial competence.

IV.

Upholding this regulation is consistent with the "first principles" of a Constitution that establishes a federal government of enumerated powers. *See Lopez*, 514 U.S. at 552. *Lopez* and *Morrison* properly emphasize that we must carefully evaluate legislation in light of our federal system of government. "The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 2000 WL 574361, at *11. We must particularly scrutinize regulated activity that "falls within an area of the law where States historically have been sovereign and countenance of the asserted federal power would blur the boundaries between the spheres of federal and state authority." *Brzonkala*, 169 F.3d at 837 (internal quotation marks omitted).

A.

It is imperative to set forth at the outset the historic roles of federal and state authority in this area. The regulated activity at issue here does not involve an "area

of traditional state concern," one to which "States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring).

Appellants argue that the regulation infringes on the traditional state control over wildlife. We are cognizant that states play a most important role in regulating wildlife—many comprehensive state hunting and fishing laws attest to it. State control over wildlife, however, is circumscribed by federal regulatory power. In *Minnesota v. Mille Lacs Band of Chippewa Indians*, the Supreme Court recently reiterated that "although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." 526 U.S. 172, 204 (1999). In *Mille Lacs*, the Court upheld Chippewa Indian rights under an 1837 treaty that allowed the Chippewa to hunt, fish, and gather free of territorial, and later state, regulation. *Id.* These Indian treaty rights were found to be "reconcilable with state sovereignty over natural resources." *Id.* at 205.

It is true that in the nineteenth century courts followed the legal precept that wildlife was the property of the state. *See Geer v. Connecticut*, 161 U.S. 519 (1896) (upholding a Connecticut statute that prohibited the interstate transportation of game birds that had been killed within the state). But the principles in *Geer* were modified early in the twentieth century. *See Hughes v. Oklahoma*, 441 U.S. 322, 329 (1979) ("The erosion of *Geer* began only 15 years after it was decided."). *Geer* was finally overruled in 1979 by *Hughes v. Oklahoma*, which held that states do not own the wildlife within

their borders and that state laws regulating wildlife are circumscribed by Congress's commerce power. 441 U.S. at 326, 335. In light of *Mille Lacs* and *Hughes*, the activity regulated by § 17.84(c)—the taking of red wolves on private property—is not an area in which the states may assert an exclusive and traditional prerogative in derogation of an enumerated federal power.

Appellants next argue that the application of this regulation to private land intrudes on the state's traditional police power to regulate local land use. Of course, states and localities possess broad regulatory and zoning authority over land within their jurisdictions. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). It is well established, however, that Congress can regulate even private land use for environmental and wildlife conservation. Courts have consistently upheld Congress's authority to regulate private activities in order to conserve species and protect the environment. For example, in a post-*Lopez* challenge to CERCLA, the Eleventh Circuit held that the private, on-site, intrastate disposal of hazardous waste was within Congress's authority to regulate because such disposal "significantly impacts interstate commerce." *United States v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997). In *Sweet Home*, the Supreme Court upheld a FWS regulation defining "harm" in the Endangered Species Act to include "significant habitat modification." 515 U.S. at 697. The regulation applied equally to private and public land. *See id.* at 692 (challenge brought by small landowners and logging companies). Here, the FWS similarly acted within its authority in determining that conservation of the red wolf population requires prohibiting certain tak-

ings on private land surrounding the refuges. *See* 51 Fed. Reg. 41,790, 41,792-93 (1986).

Given the history of federal regulation over wildlife and related environmental concerns, it is hard to imagine how this anti-taking regulation trespasses impermissibly upon traditional state functions—either control over wildlife or local land use. *Lopez* and *Morrison* properly caution that States should receive judicial protection from unconstitutional federal encroachments on state matters. Yet endangered wildlife regulation has not been an exclusive or primary state function. In this way the anti-taking regulation is distinctly unlike the GFSZA, which forbade the possession of firearms in a school zone. The Supreme Court explained that the regulation of school zones was within the "general police power" retained by the states. *See Lopez*, 514 U.S. at 567. The regulation of red wolf taking is also unlike the VAWA, which established a "right to be free from crimes of violence motivated by gender," 42 U.S.C. § 13981(b) (1994). The Supreme Court found that the VAWA impeded on family law and criminal matters of traditional state concern. *See Morrison*, 2000 WL 574361, at *11. The Court noted, "We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at *11. Unlike the GFSZA and the VAWA, § 17.84(c) does not invade traditional state concerns—it is simply one small part of an ongoing federal effort to preserve the scarcest natural resources for future generations.

In contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural re-

sources is an appropriate and well-recognized area of federal regulation. The federal government has been involved in a variety of conservation efforts since the beginning of this century. In 1900, Congress passed the Lacey Act, which provided penalties for the taking of wildlife in violation of state laws. *See* Act of May 25, 1900, ch. 553, 31 Stat. 187 (codified as amended 16 U.S.C. § 701 (1994)). The Migratory Bird Treaty Act of 1918 forbade all takings of numerous bird species and explicitly preempted state laws. *See* 16 U.S.C. §§ 703-12. Furthermore, Congress has regulated wildlife on nonfederal property through numerous statutes, including the Bald Eagle Protection Act of 1940, which prohibits, *inter alia*, the taking, possession, selling, or exporting of bald eagles or any of their parts. *See* 16 U.S.C. §§ 668-668d (1994). Similarly, the Marine Mammal Protection Act of 1972 regulates the taking of marine mammals and restricts the importing of marine mammals and their products through an elaborate system of permits. *See* 16 U.S.C. §§ 1361-1421h (1994 & Supp. III 1997). The Magnuson Fishery Conservation and Management Act of 1976 provides national standards for fishery conservation and management along with an elaborate system of enforcement. *See* 16 U.S.C. §§ 1801-83 (1994 & Supp. III 1997).

The Supreme Court has repeatedly upheld these statutes and the conservation efforts of Congress with regard to a variety of animal species. In *Missouri v. Holland*, the Court upheld the Migratory Bird Treaty Act as a necessary and proper means of executing Congress's treaty power. The conservation of endangered wildlife, Justice Holmes stated, was a "matter [] of the sharpest exigency for national well being." 252 U.S. 416, 432-33

(1920). In 1977, the Supreme Court held that Congress had the power under the Commerce Clause to grant federal fishing licenses for use in state waters, thereby preempting conflicting state laws. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977). Later in *Andrus v. Allard*, the Court emphasized that the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed." 444 U.S. 51, 63 n.19 (1979).

Post-*Lopez* cases addressing wildlife conservation statutes do not call these cases into question, but rather uphold the exercise of agency power over private land use in order to conserve endangered species. In *Sweet Home*, for example, the Court upheld the Service's broad definition of "harm" in the ESA as including "significant habitat modification." 515 U.S. at 708. The lower courts have followed suit, both before and after *Lopez*. For example, in *United States v. Hartsell*, this court reaffirmed that Congress retains authority to regulate even nonnavigable waters under the Commerce Clause. 127 F.3d 343, 348 & n.1 (4th Cir. 1997). The Ninth Circuit reaffirmed that the Bald Eagle Protection Act is a valid exercise of the commerce power because Congress had a rational basis for concluding that "extinction of the eagle would have a substantial effect on interstate commerce." *See Bramble*, 103 F.3d at 1482. In sum, it is clear from our laws and precedent that federal regulation of endangered wildlife does not trench impermissibly upon state powers. Rather, the federal government possesses a historic interest in such regulation—an interest that has repeatedly been recognized by the federal courts.

B.

It is important not simply to point to the historic fact of federal efforts in the area of resource conservation. Courts have respected the justifications for these federal efforts as well.

The Supreme Court has recognized that protection of natural resources may require action from Congress. This general point holds true where endangered species are concerned. Species conservation may unfortunately impose additional costs on private concerns. States may decide to forego or limit conservation efforts in order to lower these costs, and other states may be forced to follow suit in order to compete. The Supreme Court has held that Congress may take cognizance of this dynamic and arrest the "race to the bottom" in order to prevent interstate competition whose overall effect would damage the quality of the national environment. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, the Court upheld provisions of the Surface Mining Control and Reclamation Act of 1977 that regulated intrastate mining activities. 452 U.S. 264 (1981). The Court deferred to a congressional finding that nationwide standards were "essential" to insuring that competition in interstate commerce among sellers of coal would not be used to undermine environmental standards. *See id.* at 281-82. Congress expressed concern that such competition would disable states from improving and maintaining "adequate standards on coal mining operations within their borders." *Id.* (internal quotation marks omitted). The Court emphasized, "The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." *Id.* at 282. In *Darby*, the Court upheld a prohibition of the interstate shipment of goods produced in

violation of the Fair Labor Standards Act. 312 U.S. 100. The Court reasoned that "interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions." *Id.* at 115.

A desire for uniform standards also spurred enactment of the ESA: "Protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded." *See* H.R. Rep. No. 93-415, at 5. If we struck down this regulation under the commerce power, we would throw into question much federal environmental legislation. This would be a portentous step, leaving many environmental harms to be dealt with through state tort law. Such a movement might well subject interstate companies to a welter of conflicting obligations. If Congress is constitutionally forbidden from even enacting uniform environmental rules, the confusion for interstate commercial enterprises might increase exponentially.

In examining the justifications for federal action in this area it is important to understand the ESA as a culmination of a long legislative process of trial and error. This font of experience is something courts lack. As we noted earlier, preliminary efforts at endangered species regulation were widely viewed as inadequate precisely because they did not control private activities. The Endangered Species Act of 1966 established a National Wildlife Refuge System and prohibited disturbing animals or habitat within the System. *See* Pub. L. No. 89-669, § 4, 80 Stat. 926. The Endangered Species Act of

1969 required the Secretary of the Interior to develop a list of endangered species, and prohibited the importation of these animals or any of their byproducts without a permit. *See* Pub. L. No. 91-135, § 3(a), § 2, 83 Stat. 275. These statutes also required federal agencies to conserve species "insofar as is practicable," § 1(b), 80 Stat. at 926, and to the "extent practicable," § 3(a), 83 Stat. at 275. In response to concerns that these Acts had little impact, Congress amended the ESA in 1973 to abandon the practicability standards and to prohibit takings on private land. See 16 U.S.C. § 1538. According to the General Accounting Office, in 1993 there were 781 species listed under the ESA—over 90 percent of these species have some or all of their habitat on nonfederal lands. Nearly three-fourths of the listed species had over 60 percent of their habitat on nonfederal lands. Courts cannot simply ignore or negate congressional efforts to devise a more effective solution to a significant national problem.

C.

This regulation does not blur the boundaries between federal and state responsibility for the conservation of species. Disturbing the balance of federal and state power was a primary concern in both *Lopez* and *Morrison*. In *Lopez*, Justice Kennedy argued that one of the great dangers of the federal government regulating areas of traditional state concern is that "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." 514 U.S. at 577 (Kennedy, J., concurring). In *Brzonkala* this court observed that because the VAWA supplemented and interfered with state remedies, "the citizens of the States would not know which sovereign to hold

accountable for any failure to address adequately gender-motivated crimes of violence." 169 F.3d at 842.

Section 17.84(c) is distinguishable from both the GFSZA and the VAWA because the ultimate responsibility for the red wolf lies with the federal government. The regulation outlines the responsibilities and obligations of landowners with regard to any red wolves on their property. *See* 50 C.F.R. § 17.84(c). The FWS has also distributed fact sheets about the wolves and held meetings with local residents to explain the regulation and the reintroduction. From the time of reintroduction until 1994, North Carolina had no law or regulation concerning the red wolf. A recently passed North Carolina law bears a title starkly at odds with the federal regulation: "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." 1994 N.C. Sess. Laws Ch. 635. Unlike the GFSZA and the VAWA, § 17.84(c) does not duplicate or supplement state and local regulation. Quite to the contrary, it simply provides federal support for an endangered species. The dangers of blurring are minimal where the federal role in the protection of endangered species has traditionally been so clear.

Congress, however, did not simply sweep away the role of the states by enacting a national solution to the problem of red wolf conservation. The ESA and § 17.84(c) embody principles of cooperative federalism and seek to involve the states in the conservation effort. Such cooperative federalism does not blur state and federal roles. First, a species is listed as endangered or threatened only after reviewing "those efforts, if any, being made by any State . . . to protect such species." 16 U.S.C. § 1533(b)(1)(A). Second, once the species has

recovered and is "delisted," management responsibility will return to the states. *See id.* § 1532(3) (defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"). States can then regulate the species for hunting and resource management as it sees fit. For instance, in Minnesota, citizens have expressed interest in hunting the grey wolf, which is expected to be delisted soon and its management returned to the state. *See Feds Again Delay Wolf Management Plan: Officials Had to Do Some Rework After Legislature Failed to Pass State Plan*, Star-Tribune (Minneapolis), Nov. 29, 1999, at B7 (explaining that wolf numbers were strong enough to drop federal protection, but that the Minnesota legislature failed to pass a management plan for the wolves). Indeed, there is evidence that the recovery of the red wolf could allow a renewed trade in wolf pelts. For example, in the Northwestern Territories of Canada where wolves are plentiful, a hunter can command about $300 per pelt. *See* Fred Langan, *Hunters on Snowmobiles Cut Down Wolf Count in N.W.T.*, Calgary Herald, Mar. 3, 1998, at A7.

This regulation simply does not implicate any "immediate and concrete" federalism concerns by negating state contributions to species protection. *Brzonkala*, 169 F.3d at 840. Quite to the contrary, invalidating this regulation would deal a damaging blow to the essential place of the enumerated powers in preserving scarce resources of all sorts for the common good.

D.

Unlike the statutes in *Lopez* and *Brzonkala*, § 17.84(c) can be upheld while observing principled limitations on federal power. The regulation applies only to a single limited area—endangered species. It does not in any way grant Congress "an unlimited police power inconsistent with a Constitution of enumerated and limited federal powers." *Brzonkala*, 169 F.3d at 852. Nor does the regulation "obliterate the Constitution's distinction between national and local authority." *Morrison*, 2000 WL 574361, at *10. In *Lopez*, the Court rejected the "costs of crime" and "national productivity" justifications for the GFSZA, because under these theories it was "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." 514 U.S. at 564.

But these concerns are simply not implicated by § 17.84(c). Rather, the ESA and this regulation in particular permit the exercise of federal power only to conserve those species that are "endangered" or "threatened." The Secretary must determine whether a species is endangered or threatened "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species." 16 U.S.C. § 1533(b)(1)(A). Only after determining that a species is endangered or threatened can Congress regulate it. The rationale for upholding § 17.84(c), and the ESA generally, is restricted to the special relationship between endangered species and interstate commerce as drawn in Part III. It is not a connection that can be drawn outside of the endangered species context to support federal regulation of just any local or intrastate object with a medical, scientific, or economic value.

The rationale for this regulation thus stops far short of conferring upon Congress a broad police power. It is instead appellants' arguments for invalidating this regulation that go too far. If the federal government cannot regulate the taking of an endangered or threatened species on private land, its conservation and preservation efforts would be limited to only federal lands. A ruling to this effect would place in peril the entire federal regulatory scheme for wildlife and natural resource conservation.

V.

Finally, we offer a brief response to the views of our dissenting brother. According to the dissent, *Lopez* and *Morrison* require us to hold that the regulation at issue exceeds Congress's commerce power. We cannot accept this view. To invalidate this regulation would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones.

The dissenting opinion regrettably offers no legal basis for taking such a leap. Instead, the dissent expresses a bevy of unsupported opinions. It offers its conclusory belief that the taking of a red wolf does not constitute an economic activity. *Post* at ___. It announces with some confidence that trade in wolf pelts will never revive. *Post* at ___. And it dismisses the available studies on the red wolf's ecological and commercial value without offering the slightest bit of evidence to contradict them. *Post* at ___. Where exactly the dissent derives its view of the inconsequential status of this species is a mystery to us. But it cannot be that the mere expression of judicial derision for the efforts of the democratic branches is enough to discard them.

There should be no doubt about the implications of the dissenting opinion. Our dissenting colleague would rework the relationship between the judiciary and its coordinate branches. It is apparent that the dissent regards § 17.84(c) as ill-advised. That is fair enough, but a judge's view of the wisdom of enacted policies affords no warrant for declaring them unconstitutional. *See TVA v. Hill*, 437 U.S. at 195 ("In our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."). In recognition of the fact that the wisdom of legislation is different from its constitutionality, courts have always started with a presumption in favor of an enactment's constitutionality. *Lopez* and *Morrison* have not shifted this presumption. In fact, they have carefully maintained it. *See Morrison*, 2000 WL 574361, at *6 ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); *Lopez*, 514 U.S. at 568. Our dissenting brother proceeds on the quite contrary premise that the burden now rests with those who wish to uphold legislation. We know of no other way to interpret the dissent's view that the empirical underpinnings of this regulation are inadequate.

Reversing the presumption in favor of constitutionality plunges our dissenting brother into the thick of political controversy. As the arguments and briefs in this case attest, the matter in question involves a rather traditional struggle between property owners on the one hand

and environmentalists on the other. Both sides in this political standoff have their legitimate points to make. Property owners understandably seek more freedom to take wolves on their property. Those opposing them seek to impress the fact that even private property has historically been imbued with public responsibilities. Why the judicial branch should place its thumb on either side of this old political scale is simply beyond our comprehension. Both concern for property rights and concern for the environment play important roles in shaping political decisions. But neither can automatically be allowed to grind the nation's commerce power to a constitutional halt. An indiscriminate willingness to constitutionalize recurrent political controversies will weaken democratic authority and spell no end of trouble for the courts.

This danger is made more acute by the failure of the dissent to adopt any limiting principle for its approach. The dissent dismisses the regulation at issue as implicating nothing more than "a handful of animals, if even that, in one small region of one state." *Post* at ___. It declares that because there are only 41 wolves on private land, "the killing of even all 41 of the estimated red wolves" cannot have a substantial effect on interstate commerce. *Post* at ___. Far from being a limiting approach, the dissent's formulation is one of unprecedented breadth. It holds in essence that an endangered species can have no effect on interstate commerce on account of its endangered status and that scarce resources are on account of their scarcity too trivial to justify protection. The dissent further ignores the fact that the scarcest of natural resources, be they wildlife or mineral, will often be found in one limited locality. For

the federal courts to constitutionally disable the federal government from acting in the face of scarcity is to deal a severe blow to national strength.

Sapping the national ability to safeguard natural resources is not a course supported by precedent. After *Lopez*, the Supreme Court upheld a broad interpretation of the Endangered Species Act, see *Sweet Home*, 515 U.S. 687. And in *Morrison* the Supreme Court cited *Wickard v. Filburn* and *Heart of Atlanta Motel* for the proposition that the authority of the national government to regulate intrastate economic activity in proper circumstances had not been dismembered. 2000 WL 574361, at *7. Yet in the truncated legal universe of the dissent, the national interest in the development of natural resources counts for naught, and these cases and propositions have little, if any, role to play.

Finally, the dissenting opinion works a rent in the fabric of Our Federalism. Striking down this regulation will turn federalism on its head. *Lopez* and *Morrison* rightly emphasized the fact that the federal involvement with local school zones and the creation of civil causes of action to prevent gender-motivated violence encroached on what are traditional state functions. By contrast, the preservation of endangered species is historically a federal function. *Lopez* and *Morrison* recognized the importance of judicial review under the Commerce Clause. But, unlike the dissent, those cases set boundaries to that review and did not transform the reviewing function from a shield protecting state activities into a sword dismembering a long recognized federal one. It is as threatening to federalism for courts to erode the historic national role over scarce resource conservation as it is for Congress to usurp traditional state pre-

rogatives in such areas as education and domestic relations. Courts seeking to enforce the structural constraints of federalism must respect the balance on both sides.[5]

Of course natural resource conservation is economic and commercial. If we were to decide that this regulation lacked a substantial effect on commerce and therefore was invalid, we would open the door to standardless judicial rejection of democratic initiatives of all sorts. Courts need not side with one party or the other on the wisdom of this endangered species regulation. We hold only as a basic maxim of judicial restraint that Congress may constitutionally address the problem of protecting endangered species in the manner undertaken herein. The political, not the judicial, process is the appropriate arena for the resolution of this particular dispute. The judgment of the district court is accordingly

AFFIRMED.

LUTTIG, Circuit Judge, dissenting:

I wrote extensively on the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), and on

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[5] Emphasizing the political nature of this particular dispute does not consign Commerce Clause adjudications to the political processes, but rather takes account of the fact that judicial review is limited by the due respect that we must have for the decisions of a coordinate branch. *See Morrison*, 2000 WL 574361, at *6. It is therefore both amusing and incorrect for the dissent to suggest that upholding this endangered species regulation would somehow render Lopez or Morrison an "aberration," *post* at ___. The dissent ignores the significant differences between those cases and the present one—differences that we have chronicled in detail and with which the dissent has made no effort to deal.

the Commerce Clause in the wake of that decision, in *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999). And the Supreme Court has now provided even further guidance for the lower courts through its decision in *Brzonkala*, which is ultimately styled in that court as *United States v. Morrison*, 2000 WL 574361 (May 15, 2000). If one holds the views expressed by the Supreme Court majority in *Lopez* and *Morrison*, and by our court in *Brzonkala*, a belabored discussion of the implications of those decisions for the regulation at issue before us today is not necessary.

Here, the Fish and Wildlife Service has promulgated a regulation that prohibits private landowners from shooting, wounding, killing, trapping, or otherwise harming the canis rufus, or the red wolf, even when the wolves are on the private landowners' property and threatening their crops and livestock. However, in what the majority characterizes as an act of beneficence by the government to benefit the landowners, the government does allow a property owner—even on his own property—to kill a wolf if the wolf is about to kill the property owner himself or his family. *Ante* at ___. The question presented to us for decision is not "whether the national government can act to conserve scarce natural resources of value to our entire country," *ante* at ___, whether we should "hold as a basic maxim of judicial restraint that Congress may constitutionally address the problem of protecting endangered species," ___, or whether our decision today will "work[ ] a rent in the fabric of Our Federalism," ___, "turn federalism on its head," *id.*, or "open the door to standardless judicial rejection of democratic initiatives of all sorts," ___. Rather, the simple (and frankly, considerably less inci-

tant) question of law for us to decide is whether, assuming its validity under statute, this one particular Fish and Wildlife regulation exceeds Congress' power under the Commerce Clause.

As the majority recites, there are an estimated 41 red wolves resident on private property and 75 red wolves total, in eastern North Carolina. The majority sustains the Fish and Wildlife's regulation unhesitatingly on the ground that the taking of the 41 red wolves that might occur as property owners attempt to protect themselves and their families, their property, their crops, and their livestock from these wolves, will have a "substantial effect" on interstate commerce. This substantial effect on interstate commerce comprises, according to the majority, four separate effects on such commerce, each of which the majority views as "substantial."

First, the majority concludes, in exclusive reliance upon a Cornell University professor's unpublished study entitled "Red Wolf Recovery in Northeastern North Carolina and the Great Smoky Mountains National Park," that "many tourists travel to North Carolina from throughout the country for 'howling events'—evenings of listening to wolf howls accompanied by educational programs," ___, and thus that the taking of these wolves will have a substantial effect on the interstate commercial industry of tourism.

Second, the majority concludes, largely in reliance, not upon their substantive conclusions, but rather upon the fact of the generation of two articles—"The Red Wolf as a Model for Carnivore Reintroductions," which was published in the Symposium of the Zoological Society of London, and the 1994 unpublished study "Alligator River National Wildlife Refuge Red Wolf (Canis

Rufus) Scat Analysis"—that the taking of these red wolves will have a substantial effect on the "interstate market" of "scientific research." ___.

Third, the majority concludes, largely on the strength of an article that appears in the University of Pennsylvania Journal of International Economic Law, that the taking of these wolves will have a substantial effect on the majority-anticipated resurrection of an interstate trade in fur pelts. *Ante* at ___. In reliance upon an article that appeared two years ago in the Calgary Herald entitled "Hunters on Snowmobiles Cut Down Wolf Count in N.W.T.," the majority observes that "for example, in the Northwestern Territories of Canada where wolves are plentiful, a hunter can command about $ 300 per pelt." *Ante* at ___. The majority frankly acknowledges that there has not been a trade in wolf pelts since the 1800s, *ante* at ___, but, to the majority, "this temporal difference is beside the point." *Id.*

Finally, in reliance upon yet another unpublished study by Robert Esher and Theodore Simons entitled "Red Wolf Propagation on Horn Island, Mississippi: Red Wolf Ecological Studies," and by analogy to the finding therein of "increased shore bird nesting, likely due to the reduction in raccoon predation," *ante* at ___, the majority concludes that the red wolves which the farmers and landowners have heretofore thought threatened their families, their crops, and their livestock, actually help the farmers, by killing the animals that destroy the farmers' crops, and thereby substantially affect interstate commerce. *Ante* at ___.

That these conclusions are not even arguably sustainable under *Lopez*, *Morrison*, and *Brzonkala*, much less for the reasons cobbled together by the majority, is

evident from the mere recitation of the conclusions. The killing of even all 41 of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court in *Lopez* and in *Morrison* to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all. *Morrison*, 2000 WL 574361, at *8 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."). It is for this reason that the majority's attempted aggregation is impermissible: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 2000 WL 574361, at *9 (citations omitted). But even assuming that such is an economic activity, it certainly is not an activity that has a substantial effect on interstate commerce. The number of inferences (not even to mention the amount of speculation) necessary to discern in this activity a substantial effect on interstate commerce is exponentially greater than the number necessary in *Lopez* to show a substantial effect on interstate commerce from the sale of guns near schools or in *Morrison* to show a substantial effect on interstate commerce from domestic assault. The number (and the speculation) is even greater than that necessary in *Wickard v. Filburn*, 317 U.S. 111 (1942). And, it bears reminding, the regulated activity in *Lopez* and *Wickard* at least was in some sense economic in character.

In a word, the expansive view of the Commerce power expressed by the majority today is closely akin to that separately expressed by Justice Breyer in his dissent in *Lopez* and Justice Souter in his dissent in *Morrison*, and certainly more closely akin to those dissenting Justices' views than it is to the view of the *Lopez* majority in *Lopez* and *Morrison*. Indeed, all in all, it is a view far more expansive than that expressed by any of the dissenting Justices in either *Lopez* or *Morrison*—a fact confirmed by the dissents in *Morrison*, ironically the case for which the majority herein unnecessarily held this case in abeyance. *See* Order of April 21, 2000 (Luttig, J., dissenting from abeyance order). It goes without saying that it is much more like that of the dissent in *Brzonkala* than that of the majority in our court. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 905 (Motz, J., dissenting).

Indeed, if the Supreme Court were to render tomorrow the identical opinion that the majority does today (not necessarily the decision, but the opinion, worded capaciously as it is), both *Lopez* and *Morrison* would be consigned to aberration. And, by deciding this case as it does, and on the particular reasoning that it does, the majority would have all but consigned to aberration our own decision in *Brzonkala* were it not for the Supreme Court's recent affirmance of that decision.

I would invalidate this particular agency regulation under *Lopez*, *Morrison*, and *Brzonkala*, and instead recognize as the aberration that action of invalidation, rather than the opinions in *Lopez*, *Morrison*, and *Brzonkala*, as does the majority. *Compare Morrison*, 2000 WL 574361, at *30 (Souter, J., dissenting) (similarly to majority, characterizing *Lopez* and *Morrison*, and by

implication *Brzonkala*, as aberrational vis-a-vis the sixty years of jurisprudence predating *Lopez* and predicting that *Lopez* and *Morrison* will not be "enduring law"); *see also Morrison*, 2000 WL 574361, at *35 (Breyer, J., dissenting) ("And even were I to accept *Lopez* as an accurate statement of the law, which I do not . . . ."). I would do so without any fear whatsoever that such "would place in peril the entire federal regulatory scheme for wildlife and natural resource conservation," *ante* at ___, as the majority over-rhetorically predicts would result from the invalidation of this lone regulation. No more so than in *Brzonkala* will "maintaining the integrity of the enumerated powers" by invalidating this single regulation "mean that statutes will topple like falling dominos." *Brzonkala*, 169 F.3d at 897 (Wilkinson, J., concurring).

While it could be lost in a reading of the majority opinion, we do not address here Congress' power over either the channels or instrumentalities of interstate commerce. We do not address activity that is interstate in character. We do not address in this case a statute or a regulation with an express interstate commerce jurisdictional requirement, which would all but ensure constitutional validity. We do not have before us an activity that has obvious economic character and impact, such as is typically the case with non-wildlife natural resources, and even with other wildlife resources. We are not even presented with an activity as to which a plausible case of future economic character and impact can be made.

To the contrary, we are confronted here with an administrative agency regulation of an activity that implicates but a handful of animals, if even that, in one small region of one state. An activity that not only has no cur-

rent economic character, but one that concededly has had no economic character for well over a century now. An activity that has no foreseeable economic character at all, except upon the baldest (though admittedly most humorous) of speculation that the red wolf pelt trade will once again emerge as a centerpiece of our Nation's economy. And, importantly, an activity that Congress could plainly regulate under its spending power and under its power over federal lands, regardless.

Judge Wilkinson, for his part, has written that he regards *Lopez*, *Brzonkala*, and presumably now *Morrison*, as examples in a "spate of decisions" of "contemporary judicial activism," *Brzonkala*, 169 F.3d 820, 892-93 (Wilkinson, J., concurring), as he similarly regards the Supreme Court's decisions in *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); and *New York v. United States*, 505 U.S. 144 (1992). *See id.* The dissenting Justices in both *Lopez* and *Morrison* similarly regard these decisions. *See, e.g.*, *Morrison*, 2000 WL 574361, at *17 (Souter, J., dissenting); *see also Morrison*, 2000 WL 574361, at *30 (Breyer, J., dissenting). But I do not regard these decisions as such, and I certainly do not understand the majority of the Supreme Court to so regard these decisions.

Nor, in the wake of *Lopez* and *Morrison*, can I accept my colleagues' view of the appropriate role of the judiciary in Commerce Clause disputes. As Judge Wilkinson's view of *Lopez* mirrors that of the dissenters in *Lopez* and *Morrison*, so also does my colleagues' view of the judiciary's role in Commerce Clause conflicts mirror that of the *Lopez* and *Morrison* dissenters. The majority herein, like the dissents in both *Lopez* and *Morrison*,

takes the view that the political processes are the safeguard against federal encroachment upon the states. Thus, the majority concludes its opinion: "The political, not the judicial, process is the appropriate arena for the resolution of this particular dispute." *See ante* at ___. *Accord Morrison*, 2000 WL 574361 at *26 (Souter, J., dissenting) ("The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests . . . ."); *id.* at *27 ("As with 'conflicts of economic interest,' so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics."); *id.* (Breyer, J., dissenting) (citing Souter, J., dissenting, in *Morrison*; Stevens, J., dissenting, in *Kimel v. Florida Bd. of Regents*, 528 U.S. ___ (2000); and Blackmun, J., for the court, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)).

The majority of the Supreme Court in *Lopez* and *Morrison* has left no doubt, however, that the interpretation of this clause of the Constitution, no less so than any other, must ultimately rest not with the political branches, but with the judiciary. *See Lopez*, 514 U.S. 549, 557 n.2 ("Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.") (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)); *Morrison*, 2000 WL 574361, at *10 n.7 ("Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the

Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marshall, C.J.).").

Accordingly, I would faithfully apply in this case the Supreme Court's landmark decisions in *Lopez* and *Morrison*, as I would in any other case. The affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge.

No. 99-1218

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES GILBERT GIBBS; RICHARD LEE MANN, III; HYDE COUNTY, NORTH CAROLINA; WASHINGTON COUNTY, NORTH CAROLINA,

Plaintiffs-Appellants,

v.

BRUCE BABBITT, Secretary of the Interior, in his official capacity; UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; JAMIE CLARK, Director of the U.S. Fish and Wildlife Service,

Defendants-Appellees,

DEFENDERS OF WILDLIFE,

Intervenor-Appellee.

PACIFIC LEGAL FOUNDATION; NATIONAL WILDERNESS INSTITUTE; WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATION FOUNDATION; NATIONAL WILDLIFE FEDERATION; NORTH CAROLINA WILDLIFE FEDERATION; ENVIRONMENTAL DEFENSE FUND; WORLD WILDLIFE FUND; CENTER FOR MARINE CONSERVATION,

Amici Curiae.

Filed August 25, 2000

ON PETITION FOR REHEARING EN BANC

Appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

No. 4-97-CV-41-BO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION

CHARLES GILBERT GIBBS, SR.; RICHARD LEE MANN; HYDE COUNTY, NORTH CAROLINA; and WASHINGTON COUNTY, NORTH CAROLINA,

Plaintiffs,

v.

BRUCE BABBITT, U.S. SECRETARY OF THE INTERIOR, in his official capacity; U.S. DEPARTMENT OF THE INTERIOR; JAMIE CLARK, DIRECTOR U.S. FISH AND WILDLIFE SERVICE, in her official capacity; and U.S. FISH AND WILDLIFE SERVICE,

Federal Defendants, and

DEFENDERS OF WILDLIFE,

Defendant-Intervenor.

Decided December 21, 1998

ORDER

This matter is before the Court on three motions for summary judgment: one each from the Plaintiffs, Federal Defendants, and Defendant-Intervenors. The underlying action, in its present form, is for relief from alleged violations of the Constitution, and especially the Tenth Amendment, by the United States Fish and Wildlife Service ("FWS"). Plaintiffs seek various forms of relief, including a declaration that all federal regulations

relating to the taking of red wolves on private land are invalid, a declaration of the primacy of North Carolina laws regarding the red wolves over conflicting federal regulation, an injunction against FWS enforcement of federal regulations relating to the taking of red wolves on private land in Hyde and Washington Counties, and an award of attorney's fees and costs.

PROCEDURAL BACKGROUND

Plaintiffs filed suit against Defendants on March 3, 1997, initially presenting four claims for relief. On June 29, 1998, this Court received a stipulation of dismissal of the Plaintiffs' first, second, and third claims, leaving only one claim for relief, centering around alleged violation of the Tenth Amendment. On October 27, 1997, this Court granted a motion to intervene by the group Defenders of Wildlife, who were accordingly added as to the case as Defendant-Intervenors. A hearing was held in this matter on October 21, 1998. Discovery is complete in this matter, and the three motions for summary judgment before this Court are ripe for decision.

STATEMENT OF FACTS

The saga of the red wolf[1] in eastern North Carolina began in 1986, when the United States Fish and Wildlife

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1 The red wolf (*Canis Rufus*) was designated an endangered species in 1967. There is some question in the scientific community as to whether the red wolf is a "species," for purposes of the ESA, or a "hybrid," a result of crossbreeding between the gray wolf and the coyote. In the 1970s the FWS trapped the last red wolves in the wild and established a number of captive breeding programs. The success of these captive breeding programs allowed the FWS to consider reintroducing the red wolf to the

[Footnote continued on next page]

Service announced that it was proposing to introduce an "experimental"[2] population of red wolves into the Alligator River National Wildlife Refuge. After a period of public comment, the FWS issued a final rule outlining its release plan for red wolves on November 19, 1986.

In the fall of 1987, the FWS released four pairs of captive red wolves into the Alligator River National Wildlife Refuge. Significant resources have been devoted to this program, and the population of red wolves in the wild has grown. As the red wolves have begun to establish themselves, they have, of course, wandered off of federal land and on to surrounding private land.

This movement of red wolves onto private land provides the basis of this case. Under the Endangered Species Act ("ESA"), as well as the current rule relating to red wolves, the FWS regulates the extent to which citizens can take[3] a red wolf that has strayed off govern-

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wild. A previous proposal to release red wolves in Kentucky and Tennessee was withdrawn due to public opposition.

[2] The "experimental" designation allows the government to introduce experimental populations of endangered or threatened species into areas unoccupied by that species. Such a release is, of course, a risk to the individual animals involved, and the government can only conduct such experiments with populations considered "nonessential" to "the continued existence of an endangered species or threatened species." *See* 16 U.S.C. § 1539(j).

[3] In the context of this order, "taking" is used not as a constitutional term of art, but as it is defined in the Endangered Species Act: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [an endangered
[Footnote continued on next page]

ment land. *See* 50 C.F.R. § 17.84(c).[4] This regulation is promulgated pursuant to § 9(a)(1) of the ESA. *See* 16

[Footnote continued from previous page]
species], or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (19).

[4] The relevant text of the regulation is as follows:

(4)(i) Any person may take red wolves found on private land in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others; and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation. . . .

(iii) Any private landowner, or any other individual having his or her permission, may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section when the wolves are in the act of killing livestock or pets, provided that freshly wounded or killed livestock or pets are evident and that all such taking shall be reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(iv) Any private landowner, or any other individual having his or her permission, may harass red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, provided that all such harassment is by methods that are not lethal or physically injurious to the red wolf and is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife en-

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U.S.C. § 1538(a). Under this regulation, Plaintiff Richard Lee Mann was prosecuted, and after he pled guilty, fined and sentenced to perform community service building "wolfhouses" and feeding red wolves. Opposition to the red wolf project grew, and in 1992, the County Commission of Washington County, North Carolina passed a resolution opposing the red wolf program. This was followed in 1994 by a Hyde County, North Carolina, resolution requesting removal of red wolves from the County's private lands. This led to a 1994 North Carolina Department of Agriculture protest of the red wolf program.

Finally, in 1994, frustrated opponents of the red wolf program introduced "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." *See* 1994 N.C. Sess. Laws Ch. 635. This bill, as passed into law, declared it "lawful for a private landowner or the landowner's agent at any time to trap and kill red wolves

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forcement officer, as noted in paragraph (c)(6) of this section for investigation.

(v) Any private landowner may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section after efforts by project personnel to capture such animals have been abandoned, provided that the Service project leader or biologist has approved such actions in writing and all such taking shall be reported within 24 hours to the Service project leader or biologist, the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

Excerpts are taken from 50 C.F.R. § 17.84(c).

that are on the landowner's property, and that the property owner reasonably believes may be a threat to the person's own life or the lives of others, or to the life of livestock on the property," provided that the "landowner has previously requested the [FWS] to remove the red wolves from the landowner's property and that the landowner shall report the killing of a wolf to the [FWS] within 48 hours." *See* 1994 N.C. Sess. Laws Ch. 635 (July 1, 1994) (law applicable only in Hyde and Washington Counties). In 1995, this law was amended to include Beaufort and Crāven Counties. *See* 1995 N.C. Sess. Laws Ch. 83 (May 15, 1995). The FWS regulations regarding the red wolf are thus in direct conflict with the laws of the State of North Carolina.[5]

As of February 1998, approximately 75 red wolves were living in the wild in eastern North Carolina.[6]

DISCUSSION

Because of the Plaintiffs' stipulation voluntarily dismissing three of their four claims for relief, this Court need only consider those issues elucidated in Plaintiffs' Fourth Claim for Relief. This claim alleges that the fed-

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[5] After passage of the conflicting North Carolina law, the FWS revised its red wolf regulation to modify the circumstances under which red wolves could be taken by the public. This revised regulation still includes taking regulations in conflict with the North Carolina law. *See* 60 Fed. Reg. 18940, 18941 (1995). These changes are reflected in the excerpts from 50 C.F.R. § 17.84(c) found in footnote 4, *supra*.

[6] A similar program in the Great Smoky Mountains was recently abandoned due to the lack of success of the red wolves in adapting to that area.

eral government has violated the Tenth Amendment to the United States Constitution by "exceeding its constitutional power and privilege by prohibiting the take (sic) of red wolves on private land in Hyde County and Washington County." Plaintiffs request that this Court invalidate all federal regulations relating to the taking of red wolves on private land in Hyde and Washington Counties, "declare the primacy of North Carolina state law [relating to the taking of red wolves] against all conflicting federal regulation," and enjoin the Fish and Wildlife Service from enforcing regulations relating to the taking of red wolves on private land in Hyde and Washington Counties.

Due to the Plaintiffs' decision to concede all but their fourth claim for relief, the issue before this Court can be clearly stated by a single question: Does the federal government have the power under the Constitution of the United States to promulgate 50 C.F.R. § 17.84?

Plaintiffs, by dismissing with prejudice their other claims, have chosen to concede any issues relating to the propriety of the rulemaking process. Thus, this Court can analyze 50 C.F.R. § 17.84 in the same way it would had that regulation been passed by both Houses of Congress and signed by the President, as opposed to promulgated through the exercise of delegated rulemaking authority.

Thus, this Court begins its analysis by searching in the Constitution for a grant of authority, to Congress to make a law regulating the taking of red wolves on private land. Upon examination, the most likely source for such authority is the Commerce Clause, which states that "The Congress shall have Power . . . To regulate

Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Supreme Court precedent tells us that the Commerce Clause is much broader than it might appear, and that it is important to remember that "the task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). Even after *Lopez* placed limits on the Commerce Clause as a grant of Congressional authority, a reviewing court need only determine "whether a rational basis existed for concluding that a regulated activity" substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 557 (1995).[7]

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[7] Every circuit to consider such a matter has applied the rational basis test to post-*Lopez* Commerce Clause challenges. *See Hoffman v. Hunt*, 126 F.3d 575, 583-88 (stating and applying rational basis test) (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1838 (1997); *United States v. Knutson*, 113 F.3d 27, 29 (5th Cir. 1997) (same); *United States v. Parker*, 108 F.3d 28, 30 (3rd Cir. 1997), *cert. denied*, 118 S. Ct. 111 (1997) (same); *United States v. Olin Corp.*, 107 F.3d 1506, 1509 (11th Cir. 1997) (same); *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (same); *Terry v. Reno*, 101 F.3d 1412, 1416 (D.C.Cir.1996), *cert. denied*, 520 U.S. 1264 (1997) (same); *Proyect v. United States*, 101 F.3d 11, 12 (2d Cir. 1996) (same); *United States v. McHenry*, 97 F.3d 125, 128 (6th Cir. 1996), *cert. denied*, 519 U.S. 1131 (1997) (same); *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir. 1996), *cert. denied*, 519 U.S. 1084 (1997) (same); *United States v. Kenney*, 91 F.3d 884, 889 (7th Cir. 1996) (same); *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996) (same).

Lopez set forth the three broad categories of activity that Congress may regulate consistent with the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce. 514 U.S. at 558-59.

In this case, the nexus between the regulation at issue and interstate commerce is the red wolf. The record in this case clearly demonstrates that red wolves are "things in interstate commerce," and that they substantially affect interstate commerce through their tourism value. Under *Lopez*, it is irrelevant that the threat to red wolf-related commerce comes from intrastate "taking" of red wolves.[8]

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[8] *Lopez* also instructs a Court engaged in Commerce Clause analysis to "consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." 514 U.S. at 562. According to Congress, the various species protected by the ESA "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation." 16 U.S.C. § 1531(a)(3). This value, in the case of the red wolf, leads to a significant impact on interstate commerce.

Defendants in this case have demonstrated that tourists do cross state lines to see the red wolf, and that these tourists have an impact on commerce.[9] Defendants have further demonstrated that red wolves are to be found in several States,[10] and that some of the red wolves of Eastern North Carolina either have crossed state lines or may cross state lines in the future. All of these actions have economic consequences, as tourists, academics, and scientists follow the red wolves.[11] Unrestricted taking of red wolves on private land would present a clear threat to this commerce.[12]

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9 While it is difficult for this Court to fully assess the red wolf's impact on tourism, Defendants have presented proof that many persons have traveled from other states to attend red wolf "howling" events conducted at the Alligator River National Wildlife Refuge in North Carolina.

10 Even after the elimination of the experimental population of red wolves in the Great Smoky Mountains National Park, red wolves may be found in North Carolina, South Carolina, Florida, and Mississippi.

11 Plaintiffs do not dispute that tourists, scientists, and other interested individuals are presently traveling across state lines to view and study red wolves in the wild.

12 In another case challenging the Constitutional validity of a regulation promulgated to § 9(a)(1) of the ESA, the D.C. Circuit upheld a regulation protecting the Delhi Sands Flower-loving Fly from "takings" as a valid exercise of Congress's authority to regulate interstate commerce under the Commerce Clause. *See National Association of Home Builders v. Babbitt*, 327 U.S. App. D.C. 248, 130 F.3d 1041, 1057 (D.C.Cir. 1997). Judge Henderson, in her concurrence, based this finding on the theory that § 9(a)(1) of the ESA protects "biodiversity" and that the continued existence of said "biodiversity" substantially affects

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CONCLUSION

In assessing whether Congress exceeded its authority under the Commerce Clause, this Court notes that every act of Congress is entitled to a "strong presumption of validity and constitutionality." *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984). Since *Lopez*, no Circuit Court has determined that a federal statute is unconstitutional because it overreaches the Commerce Clause.[13] This Court does not find that this case com-

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interstate commerce, thus meeting the third *Lopez* test. This Court need not reach the issue of whether protection of "biodiversity" itself justifies Congressional action under the Commerce Clause, as the red wolf has a much more significant impact on interstate commerce and is more clearly a "thing[] in interstate commerce" than the Delhi Sands Flower-loving Fly.

[13] Thus, it is unsurprising that "courts have resisted urgings to extend Lopez beyond § 922(q)." *United States v. Wall*, 92 F.3d 1444, 1448 (6th Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997) (upholding 18 U.S.C. § 1955, which prohibits *inter alia* intrastate illegal gambling activities). Indeed, post-*Lopez*, innumerable federal statutes have been challenged on Commerce Clause grounds but not a single one has been invalidated by a federal appellate court. *See, e.g.*, *Hoffman*, 126 F.3d 575, 582-88 (upholding 18 U.S.C. § 248, which prohibits interference with access to reproductive health clinics); *United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996) (same); *Dinwiddie*, 76 F.3d at 919-21 (same); *Terry*, 101 F.3d at 1415-18 (same); *United States v. Wright*, 117 F.3d 1265, 1268-1271 (upholding 18 U.S.C. § 922(o), which prohibits intrastate possession of machine gun, and noting that every circuit to consider the question had so held) (11th Cir. 1997), *vacated in part on rehearing on other grounds*, 133 F.3d 1412 (1998); *United States v. Crump*, 120 F.3d 462, 465-66 (4th Cir. 1997) (upholding 18 U.S.C. § 924(c)(1), which prohibits use and carrying of a firearm
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pels a crossing of that line. There is a clear nexus between protection of endangered red wolves from taking and interstate commerce. Thus, this Court finds that the regulation at issue in this case is a legitimate exercise of federal power under the Commerce Clause. Accordingly, Defendants' Motions for Summary Judgment are GRANTED, and Plaintiffs' Motion for Summary Judgment is DENIED.

SO ORDERED. This 21 day of December, 1998.

TERRENCE W. BOYLE

CHIEF UNITED STATES DISTRICT JUDGE

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during and in relation to a drug trafficking crime, and noting "all of the circuits that have considered the question" had upheld the statute in the face of a *Lopez* challenge); *Olin Corp.*, 107 F.3d at 1509-10 (upholding CERCLA, 42 U.S.C. § § 9601-9675); *United States v. Allen*, 106 F.3d 695, 700-1 (6th Cir. 1997), *cert. denied*, 520 U.S. 1281 (1997) (upholding 21 U.S.C. § 860(a), the Drug Free School-Zones Act); *United States v. Hawkins*, 104 F.3d 437, 439-40 (D.C.Cir. 1997), *cert. denied*, 118 S. Ct. 126 (1997) (same); *United States v. Wells*, 98 F.3d 808, 810-11 (4th Cir.1996) (upholding 18 U.S.C. § 922(g), which prohibits possession of a firearm by a felon, and noting ten other circuits that had upheld its constitutionality under *Lopez*); *United States v. Genao*, 79 F.3d 1333, 1335-37 (2d Cir. 1996) (same); *United States v. Tisor*, 96 F.3d 370, 373-75 (9th Cir.1996), *cert. denied*, 519 U.S. 1140 (1997) (upholding congressional authority to prohibit intrastate possession or sale of narcotics); *Bramble*, 103 F.3d at 1479-82 (upholding the Eagle Protection Act, 16 U.S.C. § 668); *United States v. Michael R.*, 90 F.3d 340, 343-45 (9th Cir. 1996) (upholding 18 U.S.C. § 922(x)(2), which prohibits juvenile possession of a handgun); *United States v. Lomayaoma*, 86 F.3d 142, 144-46 (9th Cir.), *cert. denied*, 519 U.S. 909 (1996) (upholding the Indian Major Crimes Act, 18 U.S.C. § 1153).

[50 C.F.R.] § 17.84 Special rules—vertebrates.

* * *

(c) Red wolf (Canis rufus).

(1) The red wolf populations identified in paragraphs (c)(9)(i) and (c)(9)(ii) of this section are nonessential experimental populations.

(2) No person may take this species, except as provided in paragraphs (c)(3) through (5) and (10) of this section.

(3) Any person with a valid permit issued by the Service under § 17.32 may take red wolves for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act and in accordance with applicable State fish and wildlife conservation laws and regulations;

(4)(i) Any person may take red wolves found in the area defined in paragraph (c)(9)(i) of this section in defense of that person's own life or the lives of others, Provided That such taking shall be immediately reported to the refuge manager, as noted in paragraph (c)(6) of this section.

(ii) Any person may take red wolves found in the area defined in paragraph (c)(9)(ii) of this section, Provided That such taking is incidental to lawful recreational activities or in defense of that person's own life or the lives of others, and that such taking is reported immediately to the Park Superintendent.

(iii) Any livestock owner may harass red wolves found in the area defined in paragraph (c)(9)(ii) of this

section actually pursuing or killing livestock on private properties, Provided That all such harassment is by methods that are not lethal or physically injurious to the red wolf and is reported immediately to the Park Superintendent.

(iv) Any livestock owner may take red wolves found in the area defined in paragraph (c)(9)(ii) of this section to protect livestock actually pursued or being killed on private properties after efforts to capture depredating red wolves by project personnel have proven unsuccessful, Provided That all such taking shall be immediately reported to the Park Superintendent.

(5) Any employee or agent of the Service or State conservation agency who is designated for such purposes, when acting in the course of official duties, may take a red wolf if such action is necessary to:

(i) Aid a sick, injured, or orphaned specimen;

(ii) Dispose of a dead specimen, or salvage a dead specimen which may be useful for scientific study;

(iii) Take an animal that constitutes a demonstrable but non-immediate threat to human safety or that is responsible for depredations to lawfully present domestic animals or other personal property, if it has not been possible to otherwise eliminate such depredation or loss of personal property, Provided That such taking must be done in a humane manner, and may involve killing or injuring the animal only if it has not been possible to eliminate such threat by live capturing and releasing the specimen unharmed on the refuge or Park;

(iv) Move an animal for genetic purposes.

(6) Any taking pursuant to paragraphs (c)(3) through (5) of this section must be immediately reported to either the Refuge Manager, Alligator River National Wildlife Refuge, Manteo, North Carolina, telephone 919/473-1131, or the Superintendent, Great Smoky Mountains National Park, Gatlinburg, Tennessee, telephone 615/436-1294. Either of these persons will determine disposition of any live or dead specimens.

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any such species taken in violation of these regulations or in violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (c) (2) through (7) of this section.

(9)(i) The Alligator River National Wildlife Refuge reintroduction site is within the historic range of the species in North Carolina, in Dare and Tyrrell Counties; because of their proximity, Beaufort, Hyde, and Washington Counties are also included in the experimental population designation.

(ii) The red wolf also historically occurred on lands that now comprise the Great Smoky Mountains National Park. The Park encompasses properties within Haywood and Swain Counties in North Carolina, and Blount, Cocke, and Sevier Counties in Tennessee. Graham, Jackson, and Madison Counties in North Carolina, and Monroe County in Tennessee, are also included in the experimental designation because of the close proximity of these counties to the Park boundary.

(iii) Except for the three island propagation projects and these small reintroduced populations, the red wolf is extirpated from the wild. Therefore, there are no other extant populations with which the refuge or Park experimental populations could come into contact.

(10) The reintroduced populations will be monitored closely for the duration of the project, generally by use of radio telemetry as appropriate. All animals will be vaccinated against diseases prevalent in canids prior to release. Any animal that is determined to be sick, injured, or otherwise in need of special care, or that moves off Federal lands, will be immediately recaptured by Service and/or Park Service and/or designated State wildlife agency personnel and given appropriate care. Such animals will be released back to the wild on the refuge or Park as soon as possible, unless physical or behavioral problems make it necessary to return the animals to a captive-breeding facility.

(11) The status of the Alligator River National Wildlife Refuge project will be reevaluated by October 1, 1992, to determine future management status and needs. This review will take into account the reproductive success of the mated pairs, movement patterns of individual animals, food habits, and overall health of the population. The duration of the first phase of the Park project is estimated to be 10 to 12 months. After that period, an assessment of the reintroduction potential of the Park for red wolves will be made. If a second phase of reintroduction is attempted, the duration of that phase will be better defined during the assessment. However, it is presently thought that a second phase would last for 3 years, after which time the red wolf would be treated as a resident species within the Park. Throughout these pe-

riods, the experimental and nonessential designation of the animals will remain in effect.

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